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Samuel P. Newton

University of Idaho College of Law, samnewton@uidaho.edu

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2012 Utah L. Rev. OnLaw 27 (2012)

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NO JUSTICE IN UTAH’S JUSTICE COURTS: CONSTITUTIONAL ISSUES, SYSTEMIC PROBLEMS, AND THE FAILURE TO PROTECT DEFENDANTS IN UTAH’S INFAMOUS LOCAL COURTS[†]

Samuel P. Newton,* Teresa L. Welch,** & Neal G. Hamilton***

*[T]here’ll be no Justice of the Peace for you; just a big piece of justice.*¹

INTRODUCTION

Justice courts² could be called the most loved and hated court in the judicial system. The justices of the peace who preside over the courts are equally polarizing figures. The courts have been called “a powerful, multifaceted, local legal institution”³ which “helped design and weave together the social, economic, and political fabric”⁴ of American society. They have also been called a “crooked-

[†] The arguments and opinions expressed in this Article are based upon the experiences and research of the authors and do not signify the positions of Weber State University, the Salt Lake Legal Defender’s Association, or any other entity responsible for the representation of justice court defendants.

* © 2012 Samuel P. Newton, is an assistant professor of criminal justice at Weber State University. Prior to this, he was a felony trial attorney for the Salt Lake Legal Defender Association. As a trial attorney, Mr. Newton handled hundreds of cases in Utah’s justice courts and he was one of the trial attorneys for the *SLC v. Newman* case addressed in this Article, where the Utah Supreme Court addressed certain writ rights afforded to justice court defendants. Mr. Newton is also completing his doctoral degree in History at the University of Utah.

** © 2012 Teresa L. Welch is a felony trial attorney for the Salt Lake Legal Defender Association and an adjunct professor of criminal justice for Weber State University. She has handled hundreds of cases in Utah’s justice courts and, with Mr. Newton, she was one of the trial attorneys for the *SLC v. Newman* case addressed in this Article, where the Utah Supreme Court addressed certain writ rights afforded to justice court defendants.

*** © 2012 Neal G. Hamilton is a felony trial attorney for the Salt Lake Legal Defender Association. He has handled hundreds of cases in Utah’s justice courts and has argued before the Utah Court of Appeals and the Utah Supreme Court about justice court issues. Mr. Hamilton is also the chairman of the Utah Association of Criminal Defense Lawyers (UACDL) legislative committee, which is spearheading efforts to reform justice courts through rule changes and legislative action.

¹ *The Tick: Evil Sits Down for a Moment* (Fox television broadcast Nov. 4, 1995).

² Not all jurisdictions call their local courts justice courts. For the purposes of this Article, a justice court refers to a city or county court whose jurisdiction is limited to class B and C misdemeanors and infractions.

³ JOHN R. WUNDER, *INFERIOR COURTS, SUPERIOR JUSTICE: A HISTORY OF THE JUSTICES OF THE PEACE ON THE NORTHWEST FRONTIER, 1853–1889*, 19 (1979).

⁴ *Id.* at 169.

a**, f***ing thing.”⁵ One man summed up his opinion of these judges and courts by stating, “[l]ook up extortion in your Black’s Law Dictionary, and you’ll see justice courts.”⁶

As in other American states, Utah’s experiment with justice courts began with a need to administer local justice during a time when courts were few and far between. Justice courts were created to provide locally administered legal services to areas in which new populations were moving. Justices of the peace—typically nonlegally trained, but highly regarded community figures—became the de facto judges of these justice of the peace courts. Yet these century-old courts face significant growing pains in modern society given that Utah’s increased urbanization, modernization, and now significant attorney population have eliminated the justifications underlying the justice courts’ creation.

Utah’s recent attempts to reform its justice courts shows a genuine desire to modernize the courts to ensure their relevance and effectiveness in the state’s justice system, but these revisions ultimately fail to fix the problems plaguing these courts.

This Article examines the problems inherent in Utah’s justice court system and proposes solutions to those problems. Part I examines the origins and development of justice courts in England, the United States, and Utah in order to provide context for the current debate and to illustrate that the initial motivations and justifications for the courts no longer exist in the twenty-first century.

Part II discusses the numerous constitutional, structural, and procedural problems inherent in the justice courts. Justice courts continue to raise potential constitutional violations, including violations of separation of powers, due process, equal protection, and double jeopardy. Additionally, the courts appear to focus on revenue generation (rather than justice or law enforcement), continue to allow nonlawyer judges to impose relatively serious sanctions for fairly minor offenses, and unfairly incarcerate individuals who elect to pursue a new trial through the appellate process. These problems severely undermine the rights of justice court defendants and the very legitimacy of Utah’s judicial system.

Part III proposes solutions to these problems. The first and most drastic proposal is to abolish Utah’s justice courts entirely. As will be shown, the fundamental reasons that drove the creation of justice courts no longer exist in Utah. Moreover, the problems inherent to the courts outweigh any benefits they provide. Alternatively, this Article proposes several reforms aimed at improving the courts’ numerous internal problems. These alternative reforms include increasing the use of legally-trained and licensed judges, implementing sentencing guidelines, making justice courts “courts of record” so as to facilitate more just appeals, simplifying the appellate stay procedure, and eliminating justice courts’ jurisdiction over particular charges—namely enhanceable charges such as DUIs

⁵ Eric S. Peterson, *Nickeled and Dimed: Utah’s Justice Courts Exact Their Pound of Flesh*, SALT LAKE CITY WKLY., May 27, 2010, at 18, available at <http://e.cityweekly.net/cityweekly#2010/05/27/s1/?article=884757&z=49>.

⁶ *Id.* at 19.

and domestic violence offenses. Such changes are needed to effectively protect the constitutional rights of justice court defendants.

I. THE HISTORY OF JUSTICE COURTS IN ENGLAND, THE UNITED STATES, AND UTAH

Justice courts have a unique and varied history in England, the United States, and here in Utah. In England, justices, given limited jurisdiction and power, expanded and then abused their power, eventually forcing the British to eliminate the office altogether. In the United States, justice courts became an important part of the justice system during westward expansion, particularly in less populated areas. However, as in England, the courts came to be characterized by corruption and incompetence, eventually leading to reform efforts and, in some cases, outright abolition. Utah followed a similar path, though with its own twists and turns, rooted in the state's unique settlement history and early population.

An examination of the history of the justice courts, particularly the reasons justifying their creation, enables one to fully understand the justice courts' composition and role (or lack thereof) in the twenty-first century. Moreover, examination of this history shows that justice courts no longer serve the purposes that initially justified their creation.

A. *History of the Justice of the Peace in England*

*Of all the institutions in the English government the justice of the peace is the most frequently abused.*⁷

In England, the office of justice of the peace, the precursor to the justice court judge, developed gradually. When King Richard I left on a crusade to Jerusalem in the thirteenth century, he directed knights who remained behind to keep the peace and arrest lawbreakers.⁸ Richard's successor, King John, rewarded the knights⁹ as well as prominent landowners¹⁰ for their loyalty and information with the formal title of "keepers of the peace."¹¹ The keepers were initially intended to be the king's eyes and ears in different parts of the country, but they soon were asked to help sheriffs arrest offenders.¹²

⁷ E.C.S. Wade, Book Review, 2 U. TORONTO L.J. 398, 398 (1938) (reviewing L. PAGE, *JUSTICE OF THE PEACE* (1936)).

⁸ James A. Gazell, *A National Perspective on Justices of the Peace and Their Future: Time for an Epitaph?*, 46 MISS. L.J. 795, 796 (1975).

⁹ WUNDER, *supra* note 3, at 3.

¹⁰ *See id.*

¹¹ THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 167 (5th ed. 1956).

¹² CHARLES AUSTIN BEARD, *THE OFFICE OF JUSTICE OF THE PEACE IN ENGLAND IN ITS ORIGIN AND DEVELOPMENT* 19 (1904); PLUCKNETT, *supra* note 11, at 167; Gazell, *supra* note 8, at 796; *see also* Robert S. Keebler, *Our Justice of the Peace Courts—A Problem in*

Eventually, the Crown appointed wealthy landholders as keepers and asked them to serve, without pay, as “conservators of the peace.”¹³ The conservators lacked judicial authority but increasingly began, outside the scope of their authority, to receive indictments and arraign and imprison offenders pending trial.¹⁴ Parliament formally assented to this expansion of judicial authority in 1330.¹⁵ Soon, the conservators further enlarged their authority to trying defendants, and “had developed so many community legal responsibilities that they were only one step away from becoming full-fledged members of the English judiciary.”¹⁶

During the Edwardian War (of the Hundred Years’ War) and the Black Death, Edward III “needed new judicial machinery to bring peace back to his realm.”¹⁷ He issued an executive order in 1349 called the Statute of Laborers, ratified by Parliament in 1351, which set wage and price controls, and authorized the conservators of the peace to enforce the act.¹⁸ The Statute created a scenario typical of the controversies in today’s justice courts. Because the king was not directly present in many parts of England, he had little choice but to select local landowners to serve as justices since they were “the only possible wielders” of power, and the people had a strong desire to be “controlled by men of their own

Justice, 9 TENN. L. REV. 1, 6 (1930) (“[T]hey swept the streets at night with spies, arresting on the slightest pretext to extort bail fees which their clerks were forced to split with them.”). At common law, only sheriffs (in the absence of a landholding baron) had powers to arrest persons to bring before a judge and generally to keep the peace. *See* CAMERON CHURCHILL & A. CARMICHAEL BRUCE, *THE LAW OF THE OFFICE AND DUTIES OF THE SHERIFF* 1–2 (London, Stevens & Sons 1879). They also summoned and supervised juries, presided over elections, attended executions of criminals ultimately certifying the person as dead. *Id.* at 41–49, 112–38.

¹³ WUNDER, *supra* note 3, at 3; *see also* Gazell, *supra* note 8, at 796 (“This system of remuneration, however, fell into disuse as the Crown wanted to reduce public expenditures. Such desuetude, as well as a law barring lords from accepting payment for their judicial services, tended to lead to the appointment of the propertied and opulent classes over commoners and to presage a tradition that the justice of the peace served without pay.”). The practice of no remuneration continued until 1835. Keebler, *supra* note 12, at 6.

¹⁴ WUNDER, *supra* note 3, at 4.

¹⁵ *Id.*; *see also* Keebler, *supra* note 12, at 6 (“By subsequent statutes during the same reign, certain judicial powers were conferred upon the Conservators, which were gradually enlarged, and the appellation of Justice of the Peace was given them.”).

¹⁶ PLUCKNETT, *supra* note 11, at 167; WUNDER, *supra* note 3, at 4. England did not lack a judiciary at the time—county courts existed since the “kingdom was divided into shires or counties” and the Court of Common Pleas, the King’s (or Queen’s) Bench, and the Commission of Assize existed since the Magna Carta. 8 *THE AMERICAN LAW REGISTER* 66–68 (James T. Mitchell et al. eds., 1869). England also had a well-developed appellate system. *Id.* at 68–71.

¹⁷ *E.g.*, WUNDER, *supra* note 3, at 4–5.

¹⁸ *Id.* at 5. England’s population dropped from four million to two and a half million from before the Black Death to 1350. *Id.*

kind.”¹⁹ However, the king feared local control would undermine his own power, so he required that superior, or assize, judges supervise the justices.²⁰ In effect, the justices of laborers reflected “a generally acceptable balance between control and efficiency, between the interests of the crown and those of the local communities.”²¹

The power of the justices was expanded again by “sitting collectively four times per year” with several other justices and clerics (or law-trained persons) to create the Court of Quarter Sessions.²² This was under the king’s directive, and the king himself chose the members who sat. This court compelled sheriffs to “send to the justices of the peace all indictments brought in their tours.”²³ This dealt a “death blow to the judicial power of the sheriffs.”²⁴ Eventually, Parliament formalized the justices’ increased use of power with the Justice of the Peace Act in 1361.²⁵ The act critically transformed the justices of laborers from keepers of the peace, whose sole duty was to handle rudimentary and initial criminal proceedings, into “justices of the peace,” who had the power to arrest, indict, and try those accused of crimes.²⁶ Justices of the peace could only handle initial appearances on felonies, but they had nearly unfettered reign over misdemeanors. Under the justices’ continuing authority to “keep the peace,” they could arrest rioters or peace breakers, including those who refused to disperse.²⁷ They could order any person arrested or order a search of a person or property.²⁸ In “a radical departure from the common law” justices began to try these cases without juries.²⁹ In short, through

¹⁹ See JOHN H. LANGBEIN ET AL., *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 231 (2009) (citing ALAN HARDING, *A SOCIAL HISTORY OF ENGLISH LAW* 70 (1966)).

²⁰ See *id.*

²¹ Edward Powell, *The Administration of Criminal Justice in Late-Medieval England: Peace Sessions and Assizes*, in *THE POLITICAL CONTEXT OF LAW: PROCEEDINGS OF THE SEVENTH BRITISH LEGAL HISTORY CONFERENCE CANTERBURY 1985*, at 57 (Richard Eales & David Sullivan eds., 1987).

²² LANGBEIN ET AL., *supra* note 19, at 230; see also Katherine Beaty Chiste, *The Justice of the Peace in History: Community and Restorative Justice*, 68 SASK. L. REV. 153, 155 (2005) (“Quarter sessions of J.P. courts began to replace the old county courts as the real governing assembly of the county, one which reported to the King and not to the baron.”).

²³ Bertha H. Putnam, *Introduction* to *PROCEEDINGS BEFORE THE JUSTICES OF THE PEACE IN THE FOURTEENTH AND FIFTEENTH CENTURIES* xxxvii (Bertha H. Putnam ed., 1938).

²⁴ *Id.*; see C. WARREN HOLLISTER ET AL., *THE MAKING OF ENGLAND TO 1399*, at 333 (8th ed. 2001).

²⁵ Justices of the Peace Act, 1361, 34 Edw. 3, c. 1. (Eng.), available at <http://www.legislation.gov.uk/aep/Edw3/34/1>.

²⁶ WUNDER, *supra* note 3, at 5.

²⁷ LANGBEIN ET AL., *supra* note 19, at 234–35.

²⁸ *Id.*

²⁹ E.g., LANGBEIN ET AL., *supra* note 19, at 234; WUNDER, *supra* note 3, at 6.

the act, Parliament effectively, but not formally, transformed local land-owning magistrates into crown judges.

Over the next few centuries, Parliament rarely met without giving the justices of the peace even more power or expanding their number. These actions transformed the justices into what some have called the essence of local government because they “made local government work.”³⁰ But in spite of their rise, these courts soon fell into disfavor. Many criticized the justices as “inept, ignorant, and incapable [of] policing their society satisfactorily.”³¹ Some claimed the justices displayed an “ignorance in jurisprudence”³² and that “few care to undertake, and fewer to understand the office.”³³ One critic complained that the “justices line their pockets with toll taken from pick-pockets and keepers of disorderly houses; and they swept the streets at night with spies, arresting on the slightest pretext to extort bail fees which their clerks were forced to split with them.”³⁴ Edmund Burke, the great British statesman and supporter of the American Revolution exclaimed that the justices of the peace “were generally the scum of the earth; some of whom were notorious men of such infamous character that they were unworthy of any employ whatever, and others so ignorant that they could scarcely write their own names.”³⁵ Irrespective of praise or criticism, the growth of the justices of the peace ranks and the expansion of their authority significantly affected British society. Justices of the peace had become the “rulers of the county.”³⁶

This system became the model exported to the American colonies. Interestingly enough, England (Great Britain) no longer has justices of the peace. England’s experiment failed because the justices were given (and took for themselves) too much power, and then abused it. These abuses soured the country on the office itself, and eventually lead to the abolition of justice of the peace courts altogether. American states, Utah most of all, have not had the benefit of seven-hundred years of experimentation with justices of the peace, and thus have not realized that the problems in the system are intractable. As will be shown, American states, including Utah, could learn from this experience.

³⁰ WUNDER, *supra* note 3, at 6–7 (quoting WALLACE NOTESTEIN, *THE ENGLISH PEOPLE ON THE EVE OF COLONIZATION 1603–1630*, at 227 (1954)); LANGBEIN ET AL., *supra* note 19, at 234–36.

³¹ Kathleen S. Murphy, *Judge, Jury, Magistrate and Soldier: Rethinking Law and Authority in Late Eighteenth-Century Ireland*, 44 AM. J. LEGAL HIST. 231, 245 (2000).

³² *Id.* at 244 (quoting LEONARD MACNALLY, *THE JUSTICE OF THE PEACE FOR IRELAND: CONTAINING THE AUTHORITIES AND DUTIES OF THAT OFFICE*, at v (1808)).

³³ *Id.* at 245 (quoting LEONARD MACNALLY, *THE JUSTICE OF THE PEACE FOR IRELAND: CONTAINING THE AUTHORITIES AND DUTIES OF THAT OFFICE*, at v, vi (1808)).

³⁴ Keebler, *supra* note 12, at 8.

³⁵ *Id.*

³⁶ F. W. MAITLAND, *JUSTICE AND POLICE* 80 (1885).

B. History of the Justice of the Peace in America

Justices of the Peace were exported to the British colonies beginning with Jamestown in 1607.³⁷ They constituted an integral part of colonial administration from the West Indies to the Chesapeake.³⁸ As in England, a justice of the peace did not have to be legally trained, though Americans were more likely to select justices with a legal education or background.³⁹

However, during westward expansion, a short supply of legally-trained individuals necessitated courts headed by laymen, many of whom were paid from the fees they collected.⁴⁰ These justices shared little with their English counterparts beyond the title of “justice of the peace,” since they “dispense[d] with technical forms and pleadings, and require[d] causes to be disposed of with as little delay and expense as possible.”⁴¹ Justices of the peace spread throughout the West, and became “the primary judicial representatives of frontier residents in new communities.”⁴²

Americans, particularly in rural Western areas, disfavored judges with formal legal training. Lawyers were viewed as obfuscators and oppressors because of their ability to interpret a complex web of common law decisions.⁴³ Frontier justices themselves eschewed legal training, believing that ordinary people were just as capable of resolving disputes as lawyers. However, as a territory’s population grew, inadequacies of this “rural-justice” model often came to a head and consequently, the use of judges who had no legal training fell out of favor. Moreover, caseloads grew with population, and legally trained judges were seen as more able to handle the increased workload of the job in these growing cities.⁴⁴ With this shift, states increasingly sought judges with legal training.⁴⁵ Larger cities,

³⁷ Gazell, *supra* note 8, at 797.

³⁸ BRENDAN MCCONVILLE, *THE KING’S THREE FACES: THE RISE AND FALL OF ROYAL AMERICA 1688–1776*, at 149–50 (2006); WUNDER, *supra* note 3, at 7. *See generally* TREVOR BURNARD, *MASTERY, TYRANNY, AND DESIRE: THOMAS THISTLEWOOD AND HIS SLAVES IN THE ANGLO-JAMAICAN WORLD* (2004) (chronicling the life of one justice of the peace, Thomas Thistlewood, in British colonial Jamaica).

³⁹ *See* WUNDER, *supra* note 3, at 7–8.

⁴⁰ Eric H. Steele, *The Historical Context of Small Claims Courts*, 1981 AM. B. FOUND. RES. J. 293, 326; WUNDER, *supra* note 3, at 9.

⁴¹ Steele, *supra* note 40, at 326–27 (quoting Robert McMurdy, *The Law Providing for a Municipal Court in Chicago: Address Delivered at the Annual Meeting of the Illinois State Bar Association*, 38 CHI. LEGAL NEWS 398 (1906)).

⁴² WUNDER, *supra* note 3, at 18–19.

⁴³ Steele, *supra* note 40, at 302.

⁴⁴ *See Ditty v. Hampton*, 490 S.W.2d 772, 776 (Ky. Ct. App. 1973).

⁴⁵ Chester H. Smith, *The Justice of the Peace System in the United States*, 15 CALIF. L. REV. 118, 131–35 (1927); *see e.g.*, Donald P. Kommers, *The Emergence of Law and Justice in Pre-Territorial Wisconsin*, 8 AM. J. LEGAL HIST. 20, 30–32 (1964) (describing Wisconsin’s replacement of a justice of the peace with a lawyer, Justice Doty, who reformed the justice courts toward a more common law approach).

with bigger populations, also had greater financial ability to pay for professional judges and had more attorneys to staff the courts.⁴⁶

In spite of their substantial role, nineteenth century critics attacked justices of the peace and their methods. Some complained that the justices of the peace abused their position and power. One judge asked litigants to call him “the Worshipful Justice of the Peace.”⁴⁷ Other justices were alleged to have prevented people from voting, and having helped enforce slavery.⁴⁸ Justices were accused, albeit anecdotally, of bizarre methods of “frontier-justice.” For example, one Wisconsin justice of the peace would rule in favor of the person who brought him the best liquor.⁴⁹ Another justice simply refused to apply the law, stating “I don’t have a law book in the office, and that isn’t all—I don’t want any. I do what I think is right”⁵⁰ A California justice of the peace allegedly smelled defendants claiming he could “identify an honest person by his scent.”⁵¹

Critics further complained that the courts were unsupervised,⁵² controlled by political machines, “served at the pleasure of the party or person in power,”⁵³ and operated their courts as moneymaking ventures.⁵⁴ Opponents called justices of the peace “public menace[s] . . . to be resisted with grim determination.”⁵⁵ Significant problems were found with the lack of a formal record, “which resulted in numerous trials de novo on appeal.”⁵⁶ Some claimed the judges were incompetent and had failed to fulfill their purpose.⁵⁷ One early critic complained that their appellate process and concurrent jurisdiction wasted judicial resources.⁵⁸ The

⁴⁶ *Ditty*, 490 S.W.2d at 776.

⁴⁷ WUNDER, *supra* note 3, at 13.

⁴⁸ *Id.* at 13, 17–18.

⁴⁹ Kommers, *supra* note 45, at 27 n.37.

⁵⁰ C.B.S., Note, *Limiting Judicial Incompetence: The Due Process Right to a Legally Learned Judge in State Minor Court Criminal Proceedings*, 61 VA. L. REV. 1454, 1456 (1975).

⁵¹ *Id.* at 1456.

⁵² JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 149 (1950); Smith, *supra* note 45, at 140–41 (“They are often ignorant and wholly uncontrolled by statute or constitution. Their decisions are purely personal.”). States did little to develop a supervisory organization beyond providing for *de novo* appeals. *Id.* at 129.

⁵³ Steele, *supra* note 40, at 329.

⁵⁴ HURST, *supra* note 52, at 327; Smith, *supra* note 45, at 140 (“The pernicious fee system and local politics break down their integrity and lead to corruption.”).

⁵⁵ Steele, *supra* note 40, at 327 (quoting Manual Levine, Conciliation Court of Cleveland, Address Before the American Political Science Association (Dec. 30, 1914), in 2 J. AM. JUD. SOC’Y 10 (1918)).

⁵⁶ Gazell, *supra* note 8, at 800.

⁵⁷ Thomas Patterson, *Jurisdiction of the Justice of the Peace, and the Possible Application in Pennsylvania of the Small Debtors’ Court on the English Plan*, 45 AM. L. REG. & REV. 481, 481 (1897); see, e.g., Steele, *supra* note 40, at 328.

⁵⁸ Gazell, *supra* note 8, at 799–800.

collective problems inherent to the courts were undermining the justice system as a whole.⁵⁹ In short:

Much of the criticism of the justice of the peace system thus is almost the exact opposite of the criticism of the regular courts. Where the regular courts were accused of allowing too little judicial discretion, the justice of the peace was criticized for the excessive discretion he exercised. Justices of the peace were also criticized for their lack of training. The major thrust of the criticism was that because of incompetence and bias, substantial justice could not be had in the justice courts. This resulted in delay and expense for the litigant, a cluttering of the regular courts with cases on appeal, and a diminishing of respect for justice on the part of the public.⁶⁰

This was a dramatic about-face, as many of the defining virtues of justice courts supporting their creation and continuation—lay interpretation, speed, and closeness to the people—came to be seen as systemic weaknesses.⁶¹

These criticisms led to an increased movement to disband justice courts or alternatively to require justices of the peace to have legal training.⁶² Reformers sought to “wipe out the disgrace of our inferior courts,” since most citizens’ only encounter with the justice system would be in a justice court.⁶³ In 1906, Chicago was the first to abolish its justice courts, and several other states followed in the 1920s.⁶⁴ By the 1960s, the abolition movement escalated with a vengeance. Nearly every major study or group that looked at the justice of the peace system either “explicitly or implicitly sought the abolition of justices of the peace.”⁶⁵ In the 1960s and 1970s, more than a dozen states eliminated the office of justice of the

⁵⁹ Smith, *supra* note 45, at 140–41 (“The administration of justice by these lay magistrates is uncertain, unequal and unstable, and in truth, the system as such, is a denial of justice according to our highest conception of the term.”).

⁶⁰ Steele, *supra* note 40, at 329.

⁶¹ *Id.* at 327.

⁶² Herbert Harley, *Administering Justice in Cities*, in 136 ANNALS AM. ACAD. POL. & SOC. SCI. 87, 87 (1928).

⁶³ *Id.* at 94; Smith, *supra* note 45, at 140–41 (“The importance of the justice of the peace system cannot be over-estimated for it is in these minor courts that most of our citizens come in contact with our judicial organization.”).

⁶⁴ Harley, *supra* note 62, at 89–94.

⁶⁵ Gazell, *supra* note 8, at 800. This included the American Bar Association, the American Judicature Society, the National Municipal League, the Institute for Judicial Administration, the President’s Commission on Law Enforcement and Administration of Justice, the Committee on Economic Development, the National Advisory Commission on Civil Disorders, the National Conference on the Judiciary, the Advisory Commission on Intergovernmental Relations, and the National Advisory Commission on Criminal Justice Standards and Goals. *Id.* at 800–01.

peace.⁶⁶ Another dozen states did not formally eliminate the office, but restricted its jurisdiction or power.⁶⁷ The pace of abolition snowballed: as more and more states abolished or significantly reformed their justice courts, other states could justifiably join the trend.⁶⁸ This rapid change prompted some to predict the demise of the justice of the peace system.⁶⁹ However, predictions of the total demise of the justice courts proved incorrect. After 1975, only five states took action to eliminate the office,⁷⁰ leaving few states with justice court systems.

The United States lacks uniform professional requirements for its justice court judges. Many states require judges to have legal training.⁷¹ Some require a law license, while others also require justices to have practiced law for at least a time.⁷²

⁶⁶ These states include Alabama, Florida, Idaho, Illinois, Iowa, Maine, Maryland, Michigan, Nebraska, New Mexico, Oklahoma, South Dakota, Vermont, and West Virginia. Gazell, *supra* note 8, at 808–10. Iowa established a unified trial court, the district court, in 1973, abolishing 500 justice of the peace courts, 899 mayor's courts, fourteen municipal courts and thirty-four police courts. *Methods of Judicial Selection: Limited Jurisdiction Courts*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/methods/limited_jurisdiction_courts.cfm (last visited Nov. 23, 2011).

⁶⁷ For example in 1961, Washington state eliminated the Justice Courts in its largest counties and let smaller counties determine whether to keep Justices of the Peace. All but seven counties eliminated the position. Delaware made the justice of the peace state officials under direct supervision of the state supreme court. Kansas, in 1972, eliminated the Justice Courts' ability to have virtually any power as the state reduced a court's jurisdiction to \$1 and abolished constitutional references to the office. Several states, such as Texas, Montana, Georgia, Mississippi, Louisiana and Kentucky, had a more difficult time enacting changes to the existing structure. Voters in Montana and Nevada rejected constitutional amendments to change the office. For some states, like Mississippi and Georgia, locating the justices of the peace proved to be a difficult endeavor. Georgia's attempt to locate its justices of the peace turned up 1,728 justices by 1975. Mississippi's legislature recommended in 1970 reducing the number of justices of the peace from 500 to 200. Gazell, *supra* note 8, at 808–12.

⁶⁸ *Id.* at 813.

⁶⁹ *Id.* at 813 (“[T]he time may soon be at hand to write an appropriate epitaph for this office, especially since 31 states have progressed toward the abolition of this position and its counterparts. . . . It is likely that all the states will have replaced this institution before the end of the 20th century. . . . If states continue to act as they have since 1971, all states will have eliminated (or have moved toward the abolition of) justices of the peace by 1981 at the earliest.”).

⁷⁰ *Methods of Judicial Selection: Limited Jurisdiction Courts*, *supra* note 66. In November 2000, Arkansas voters approved the merger of their smaller courts (i.e. municipal courts, justice of the peace courts, corporation courts, police courts, and courts of common pleas) into one court—the district court. *Id.*

⁷¹ Alabama, Alaska, Arkansas, California, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Vermont, Virginia, and Wisconsin. *See id.*

⁷² *Id.* (listing law practice period of usually three to ten years).

Other states, including Utah, continue to allow nonlawyers to adjudicate some criminal matters.⁷³ Most states require municipal/local judges to be at least eighteen- or twenty-one-years old,⁷⁴ to be United States citizens and state residents, and to read and write English.⁷⁵ Others merely require a high school diploma.⁷⁶ Some jurisdictions require judges to undergo annual training.⁷⁷

There are also a variety of selection and removal mechanisms in place for justice court judges across the United States. The most common method of both appointment and retention is by some form of election; two thirds of the states follow this method.⁷⁸ Several states appoint judges through the governor, city, or county council and many either retain them for life or by reappointment through the same process.⁷⁹

Finally, the criminal jurisdiction of municipal nonlegally trained justices of the peace varies greatly across America. Many states allow the nonlegally trained justice to have jurisdiction over misdemeanor and traffic offenses.⁸⁰

Like in England, most states' experiment with the justice of the peace system led to abuses of power and to severe criticisms—which ultimately resulted in

⁷³ Arizona, Delaware, Indiana, Mississippi, Montana, New Mexico, New York, Ohio, Oregon, South Carolina, Texas, Utah, Washington, and West Virginia. *Id.*

⁷⁴ Idaho requires its magistrates to be at least thirty years of age. *Id.* Some jurisdictions, like Louisiana, set an upper age limit of age 70. *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* The Colorado municipal court requires only a high school diploma or equivalent, though the municipality may require the judge to be an elector of the municipality or county.

⁷⁷ *Id.* Texas, Utah, West Virginia, and Wisconsin require municipal judges to undergo annual training in the range of twenty to forty hours annually. Colorado allows nonlawyers to serve as municipal judges, but municipalities must give preference to law-trained applicants. *Id.* Georgia created the office of magistrate, a non-law-trained position with very limited jurisdiction and authority. *Id.* Indiana allows cities to set judge qualifications; some require legal training. *Id.* New Mexico allows judges without legal training in cities with a population less than 200,000. *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* In Alabama, for example, justices of the peace (or municipal judges) are appointed by the municipality and are subject to reappointment by the municipality, whereas in Arizona, non-lawyer justices of the peace are selected and retained by a partisan election. *Id.*

⁸⁰ *Id.* In Arizona, for example, a municipal judge and a justice of the peace have jurisdiction over misdemeanors, domestic violence, and traffic cases. *Id.* In Delaware, justices of the peace hear traffic cases and non-jury misdemeanors, while Aldermen hear misdemeanors and traffic and parking violations. *Id.* Indiana's city and town courts adjudicate ordinance violations, misdemeanors, and infractions. *Id.* Mississippi and Montana allow their justice courts to hear misdemeanors and preliminary hearings. *Id.* Oregon gives its municipal courts jurisdiction over state liquor law violations and non-felonious state traffic offenses. *Id.* In South Carolina, a magistrate or municipal court judge's jurisdiction is limited to criminal cases in which the penalty is no greater than thirty days incarceration or a \$500 fine. *Id.* Utah's justice courts only have jurisdiction for offenses that carry less than 180 days of incarceration. *Id.*

abolition or limitation of the power of the justice of the peace. Utah, however, continues to hold on to the antiquated system.

C. History of the Justice of the Peace in Utah

Like other states, Utah also imported justices of the peace to its newly created territory. Utah's unique history helps explain its continued commitment to justice courts. Prior to obtaining territorial status in 1850, Utah's legal system consisted of ecclesiastical courts. Governor Brigham Young appointed Mormon bishops as "magistrates of the ward," who resolved legal disputes in addition to carrying out church responsibilities.⁸¹ When Congress created the Utah territory in 1850, bishops continued to act as Utah's first justices of the peace.⁸²

Soon after the creation of the territory, Congress dispatched three federal judges to establish a formal judicial presence. However, upon arrival at least one judge "found an empty docket" as Mormons continued to use church courts.⁸³ Almost immediately after arrival, the other two judges clashed with the Mormons and left the territory. They complained to President Fillmore of Mormons' "lawless acts" and "denunciation[s] so violent and so offensive as to set at defiance . . . [the] just administration of laws."⁸⁴

The conflict intensified. Mormons saw federal courts "as serious threats to their rights of self-governance and religious distinctiveness."⁸⁵ Judges, in turn, saw Mormon resistance as evidencing their un-American attitudes and lawlessness.⁸⁶ Mormons, however, also believed their ecclesiastical courts, in which the common law rules were often ignored, were better suited to the community.⁸⁷ Because of Mormons' desire to avoid the federal courts for all matters, the territorial legislature granted exclusive criminal jurisdiction to locally-controlled probate courts, which traditionally handled wills and estates. The Mormons' position aggravated the already strained position between the nation's desire to administer

⁸¹ WUNDER, *supra* note 3, at 18; RICHARD S. VAN WAGONER, MORMON POLYGAMY: A HISTORY 107–08 (2d ed. 1989).

⁸² WUNDER, *supra* note 3, at 18.

⁸³ EDWARD BROWN FIRMAGE & RICHARD COLLIN MANGRUM, ZION IN THE COURTS: A LEGAL HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, 1830–1900, at 215–16 (1988); *see also* KATHRYN M. DAYNES, MORE WIVES THAN ONE: TRANSFORMATION OF THE MORMON MARRIAGE SYSTEM, 1840–1910, at 40–41 (2001) (describing the early church courts and the creation of federal courts).

⁸⁴ CONG. GLOBE, 32d Cong., 1st Sess. app. 86 (1851); FIRMAGE & MANGRUM, *supra* note 83, at 215; 3 B.H. ROBERTS, A COMPREHENSIVE HISTORY OF THE CHURCH OF JESUS-CHRIST OF LATTER-DAY SAINTS 522–23 (1930); James B. Allen, *The Unusual Jurisdiction of County Probate Courts in the Territory of Utah*, 36 UTAH HIST. Q. 132, 135 (1968).

⁸⁵ FIRMAGE & MANGRUM, *supra* note 83, at 216.

⁸⁶ *Id.*

⁸⁷ DAYNES, *supra* note 83, at 41. For example, the territorial legislature required attorneys to present any fact to a court, even if those facts were adverse to their clients' interests, a common practice in ecclesiastical courts. FIRMAGE & MANGRUM, *supra* note 83, at 218 (citing 1852 Utah Laws 37, §5).

common law justice with its federal courts and Mormons' desire to keep justice local with their probate courts.⁸⁸ In response, the federal courts ordered United States Marshals to ignore the commands of probate courts; probate courts in turn ordered the marshals to quash the orders of federal courts.⁸⁹ One federal judge ordered that any criminal conviction from a probate court be overturned for lack of jurisdiction, which resulted in the release of a man sentenced and incarcerated for assault with intent to kill.⁹⁰

This conflict ultimately became part of the cause of the Utah War, in which the federal government dispatched the majority of the United States Army to the Utah Territory with instructions to quell the Mormon insurrection.⁹¹ Though the Army never fired a shot, its presence—coupled with a series of United States Supreme Court decisions and Congressional Acts which disincorporated the Mormon Church, allowed for the prosecution of Mormon polygamists, and eliminated Mormons' ability to hold political office—allowed federal officials to obtain the Mormon church's capitulation.⁹² The church surrendered its practice of polygamy, agreed to participate politically in the United States, and agreed to recognize the jurisdiction of federal courts.⁹³

The Mormons' surrender allowed Utah to formally enter the Union in 1896, and the new state constitution provided for justices of the peace.⁹⁴ There is little evidence of the framers' motive to include the office. Only one of the framers of the Utah Constitution commented about justice courts, and it was to affirm that justice court decisions could be appealed de novo.⁹⁵ One could plausibly attribute justice courts' inclusion in the Constitution to the significant distrust of federal authority considering the prior conflict and Mormons' preference for locally

⁸⁸ Allen, *supra* note 84, at 135–39.

⁸⁹ *Id.* at 135–40.

⁹⁰ *Id.* at 136.

⁹¹ See generally 1 WILLIAM P. MACKINNON, AT SWORD'S POINT: A DOCUMENTARY HISTORY OF THE UTAH WAR TO 1858 (2008) (documenting the Utah War); DONALD R. MOORMAN & GENE R. SESSIONS, CAMP FLOYD AND THE MORMONS: THE UTAH WAR (1992) (same).

⁹² See generally SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA (2002) (tracing the early history of the church and its struggle with the federal government).

⁹³ See generally THOMAS G. ALEXANDER, MORMONISM IN TRANSITION: A HISTORY OF THE LATTER-DAY SAINTS, 1890–1930, at 3–4 (1986) (describing the incorporation of Utah into the United States); GORDON, *supra* note 92, at 219–24 (discussing “the abandonment of Mormons' claim to a constitutional right” to polygamy); B. CARMON HARDY, SOLEMN COVENANT: THE MORMON POLYGAMOUS PASSAGE 284–309 (1992) (following the encounters between Utah and progressives in the late nineteenth and early twentieth century, as Utah became integrated into the United States); Jonathan H. Moyer, Dancing With the Devil: The Making of the Mormon-Republican Pact, at iv–v (Aug. 2009) (unpublished Ph.D. dissertation, University of Utah) (discussing how the Mormon church joined the political mainstream).

⁹⁴ UTAH CONST. art. VIII, § 8 (repealed 1984).

⁹⁵ 2 UTAH PROCEEDINGS CONSTITUTIONAL CONVENTION 1507–08 (1895).

controlled judicial systems. Moreover, some evidence supports the proposition that justice courts arose because rural areas could not afford professional courts and state courts were few and far between.⁹⁶

As previously discussed, after Utah's statehood, states around the nation moved to abolish or reform their justice of the peace courts. For some reason, Utah's justice court system remained fundamentally unchanged and largely unchallenged until the 1970s when the Utah Legislature authorized its Legislative Council to study the state's court system.⁹⁷ After a year of study, the Legislative Council identified numerous problems so serious and weighty that the council recommended dissolving the justice courts and transferring their cases to the district courts.⁹⁸

The council was concerned that justice courts varied excessively in the quality of justice they dispensed. "[E]xperience, training, compensation, temperament [sic] and attitude" varied greatly, with the greatest problems occurring in justice courts.⁹⁹ The council was further troubled because many justice courts operated in "outmoded and improperly maintained courtrooms" with "poor . . . fixtures and furniture."¹⁰⁰ It emphasized that "some local governments provide their courts with adequate funds and facilities, while others are given minimal attention."¹⁰¹ Most troubling to the council was the fact that justices of the peace were still paid on a case-by-case basis.¹⁰² Paying by the case resulted, the council said, in judicial salaries ranging from \$100 to \$30,000 annually.¹⁰³ "[I]t became evident that some local court judges consistently levied higher fines than other judges for similar violations."¹⁰⁴ The council was especially concerned that few justices even possessed state law mandated copies of the Utah Code and a handbook created by the Utah Supreme Court.¹⁰⁵

The council had additional concerns about the state's justice courts. They noted that cities treated justice courts as revenue-driven entities, since fee collection seemed to be the largest motivation for creating a justice court.¹⁰⁶ They were further concerned that even though justice courts were the most "highly visible" court in the state, there was a "leadership void" where "no one person or

⁹⁶ See Benjamin Will Bates, *Exploring Justice Courts in Utah and Three Problems Inherent in the Justice Court System*, 2001 UTAH L. REV. 731, 737–38.

⁹⁷ UTAH LEGISLATIVE COUNCIL, UTAH COURTS TOMORROW: REPORT AND RECOMMENDATIONS OF THE UNIFIED COURT ADVISORY COMMITTEE 1 (1972).

⁹⁸ *Id.* at 3. Part of the reason the council recommended dissolving the courts instead of reform was because historically reform had "largely been resisted" and "attempts to improve the overall operation of [justice] courts [had] never succeeded." *Id.* at 10.

⁹⁹ *Id.* at 11.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 12.

¹⁰⁶ See *id.* at 13.

group” was responsible for the operation of the courts.¹⁰⁷ The disparity of having each municipality dispense its own version of justice resulted in an inconsistent and arbitrary system: “any malfunction in court administration at this level reflects in the public’s eyes on the operation of the entire court system.”¹⁰⁸

The council recommended court unification—eliminating justice courts and assigning their cases to the district courts—as the solution to these problems.¹⁰⁹ Such reform had additional benefits. Since Utah’s transportation system had evolved dramatically since the justice courts’ creation, Utahns no longer needed courts in remote places.¹¹⁰ Unification would resolve issues of communication between justice and district courts.¹¹¹ It would also eliminate forum shopping.¹¹² State funding of all courts would eliminate concerns that justice courts operated merely to collect revenue, since “all courts . . . [must have] the same access to funds and resources”¹¹³ and the state could provide the funds necessary to ensure a fair judicial process that comported with constitutional guarantees. Moreover, judges could decide cases on their merits rather than based on external pressures from other branches of government.

To alleviate the potential overload on district court judges, the council recommended elevating existing justices of the peace to the position of District Magistrate.¹¹⁴ The magistrates would serve below the district judges, and would be nominated by commission and retained by election.¹¹⁵ The council recommended that magistrates be attorneys, except in some “less-populated” areas “where there are few, if any attorneys.”¹¹⁶ At a minimum, the council felt like the magistrates should be United States citizens, should pass a qualifying examination, take yearly legal education courses, and have relevant age and experience.¹¹⁷ The council also recommended that all judges statewide have a legal education.¹¹⁸

In response to the council report and several direct legal challenges to the justice courts,¹¹⁹ Utah took the dramatic step of creating a statewide system of

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 19.

¹¹⁰ *Id.* at 45; see also Comment, *Circuit Court Plan Can Upgrade Utah Justice*, DESERET NEWS, Dec. 3, 1976, at A5 (“JPs still serve a useful purpose in outlying rural areas with small populations. Their retention along the Wasatch Front, however, is an anomaly.”).

¹¹¹ See UTAH LEGISLATIVE COUNCIL, *supra* note 97, at 12.

¹¹² See *id.* at 13.

¹¹³ *Id.* at 45.

¹¹⁴ *Id.* at 38–39; see also *Circuit Court a Step Closer*, DESERET NEWS, Dec. 2, 1976, at B1 (noting the creation of circuit courts would “ease the . . . burden on district courts, allowing them more time for more serious cases”).

¹¹⁵ See UTAH LEGISLATIVE COUNCIL, *supra* note 97, at 39.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* Although the council recommended all judges have legal training, it left room for the committee to allow nonlegally trained judges in remote areas. *Id.*

¹¹⁹ See *infra* Part II.

circuit courts, designed largely to replace its justice courts.¹²⁰ In this system, circuit courts were given jurisdiction to hear misdemeanor cases, as well as the authority to hear felony matters up until bind-over to the district court. For felonies, all proceedings up to and including preliminary hearings were conducted in the circuit courts. The circuit court's proceedings were recorded.¹²¹ Trials de novo were eliminated, since the circuit court's proceedings would be recorded. All judges were to be legally trained and were paid out of state funds at the rate of 90% of the salary of a district court judge.¹²²

In the early 1990s the circuit court system was eliminated and replaced with a commissioner system; circuit court judges were moved to district court positions.¹²³ The commissioners essentially exercised all of the powers of the former circuit court judges, but were not appointed according to Utah's constitutional requirements.¹²⁴ The lack of compliance with the constitution ultimately proved to be the downfall of the commissioner system. In *Salt Lake City v. Ohms*, the Utah Supreme Court declared the commissioner system unconstitutional because the commissioners exercised judicial authority without undergoing proper judicial selection.¹²⁵

The elimination of the commissioner system created a judicial void across Salt Lake County.¹²⁶ District Courts were located in Sandy, West Jordan, Murray, West Valley, and Salt Lake City. All criminal offenses filed in Salt Lake County

¹²⁰ See *Circuit Court a Step Closer*, *supra* note 114; Comment, *supra* note 110; Robert D. Mullins, 33 *Circuit Court Judges Take Oaths July 1*, DESERET NEWS, June 16, 1978, at B1; Joseph T. Liddell, *1st Criminal Case in New Circuit Court*, DESERET NEWS, July 7, 1978, at A14 ("The case marks the transition from a city to circuit court system, which is administered by the state."); Jan Thompson, *Former Justice Official Seeks to Unify Utah's Court System*, DESERET NEWS, Aug. 30, 1991, at B3 (referring to only three kinds of judges in Utah: juvenile, circuit, and district. Noting that in rural areas, attorneys may have to travel more than 100 miles to get a circuit court judge); see also *Salt Lake City v. Ohms*, 881 P.2d 844, 857 (Utah 1994) (Howe, J., dissenting) ("Only seven years earlier in 1977, city judges had been automatically made circuit judges and a statewide circuit court system had come into place. The trial and sentencing of persons charged with misdemeanors was a major part of circuit court work. Because all city judges holding office as of July 1, 1977, automatically became state circuit court judges, some parts of our state had more circuit judges than the case load at that time required.").

¹²¹ Liddell, *supra* note 120.

¹²² Mullins, *supra* note 120.

¹²³ *Ohms*, 881 P.2d at 849 (discussing the use of circuit courts, district courts, courts of appeals, and juvenile courts); *Utah Court System*, UTAH ST. ARCHIVES & RECS. SERVICE (June 29, 2010), <http://archives.utah.gov/research/guides/courts-system.htm>.

¹²⁴ *Ohms*, 881 P.2d at 850–53 (noting state law requires a judicial nominating commission and other procedures).

¹²⁵ *Id.* at 850–55; see also *State v. Taysom*, 886 P.2d 513, 513 (Utah 1994) (reversing conviction for the same reason).

¹²⁶ Stephen Hunt, *Court Reversal Doesn't Stop the Questions: Are Utah Justices Just Righting a Wrong or Wronging Rights? Does New Ruling Right a Wrong or Wrong Rights?*, SALT LAKE TRIB., Aug. 20, 1994, at A1.

had to be filed in these locations (except for infractions and Class B and C misdemeanors committed in unincorporated Salt Lake County, which continued to be filed with the Salt Lake County Justice Court). The result was “chaotic.” In this void municipal justice courts began to re-emerge in Utah and it quickly returned to the situation prior to circuit court movement.¹²⁷

Today, justice courts dot Utah's legal (and physical) landscape. These courts experience the same problems and concerns of other states' municipal courts. Recognizing these problems, Utah engaged in a meaningful attempt to restructure its courts, but ultimately fell back to a system with the same problems as before. There are currently over one hundred municipal courts in the state which, like their predecessors, continue to create problems.

II. INEXORABLE CONSTITUTIONAL, STRUCTURAL, AND PROCEDURAL PROBLEMS IN UTAH'S JUSTICE COURTS

Utah's justice courts are plagued by several inherent constitutional, structural, and procedural problems. The courts raise a number of separation of powers issues because justices of the peace act as members of the executive branch. The justice courts are also constitutionally problematic, since they retain revenue generation (instead of justice) as a primary interest, and place far too much authority and judicial power in the hands of judges who are inadequately trained. Furthermore, the justice courts inefficiently and unnecessarily duplicate services. Together, the problems undermine the legitimacy of the courts themselves as well as the greater justice system, and lend strong support for the remedial actions discussed below.

A. Utah's Justice Courts Violate Separation of Powers

Utah's justice courts raise a number of separation of powers problems. First, the justice courts are structured so that judges are executive officers of municipalities and remain under the direct supervision of those cities in violation of the Utah constitution. Second, justice courts allow prosecutors to exercise legislative powers to create new offenses within the justice court's jurisdiction.

1. Title 10 of the Utah Municipal Code Does Not Provide for the Creation of a Judicial Body in Municipalities

The Utah State Legislature created the primary separation of powers problem that plagues Utah's justice courts; it involves the role justice court judges must

¹²⁷ Jay Baltezore, *S.L. Council OKs City-Run Courts for Misdemeanors*, SALT LAKE TRIB., June 2, 1995, at B3. The city claimed state-run courts gave “misdemeanor cases short shrift.” *Id.*; see also *Bountiful Will Replace Circuit Court in 1994*, SALT LAKE TRIB., May 29, 1993, at C2. City of Bountiful officials preferred the circuit court system, but it meant having to travel further for minor offenses. *Id.* Ultimately, convenience won the day. *Id.*

take in the organization of the municipality. Utah's constitution provides that "[t]he judicial power of the state shall be vested in a Supreme Court, in a trial court of general jurisdiction known as the district court, and in such other courts as the Legislature by statute may establish."¹²⁸

The term "judicial power . . . is generally understood to be the power to hear and determine controversies between adverse parties and questions in litigation."¹²⁹ Because these powers are core to the judicial branch,¹³⁰ "no person charged with the exercise of powers properly belonging to [the Legislative or Executive branches of government]" may exercise these powers.¹³¹ Only members of the judicial branch of government may "enter final judgments and orders or impose sentence."¹³²

The statutory creation of justice courts, authorized by article VIII, section 1 of the Utah Constitution, is found in title 78A, chapter 7, of the Utah Code. Under these statutes, the powers to establish, oversee, maintain, and dissolve a justice court are firmly vested with the governing body of a municipality.¹³³ Under Utah law, a municipality desiring to create a justice court must file a written declaration with the Judicial Council.¹³⁴ Following such a request, and after a review of compliance with operating standards "established by statute and the Judicial Council," the Judicial Council is *required* to certify the creation of the court.¹³⁵

Although title 78A, chapter 7, clearly indicates how a justice court is to be created, it is silent as to what position justice courts are to occupy in the organizational structure of the municipality. This silence raises separation of powers concerns.

Utah's Constitution prohibits members of separate branches from exercising the powers belonging to another branch.¹³⁶ The problem comes from the fact that Utah statutes treat municipalities as "political subdivisions of the state of Utah," which operate under a legislative and executive body.¹³⁷ City councils hold municipal legislative power, while mayors hold executive power.¹³⁸

While Utah law provides for judicial bodies at the state level (Supreme Court, Court of Appeals, District Court, and Juvenile Court), there is no provision for judicial bodies to exist at the municipal level. Justice courts, created and operated by municipalities, do so as a member of the executive or legislative branch. This is not by choice, but by necessity, because Utah law does not provide for another place for justice courts to operate.

¹²⁸ UTAH CONST. art. VIII, § 1.

¹²⁹ *Citizens' Club v. Welling*, 27 P.2d 23, 26 (Utah 1933).

¹³⁰ *Ohms*, 881 P.2d at 848.

¹³¹ UTAH CONST. art. V, § 1.

¹³² *Ohms*, 881 P.2d at 848.

¹³³ See UTAH CODE ANN. §§ 78A-7-102, -103, -123 (West 2009).

¹³⁴ *Id.* § 78A-7-102(3).

¹³⁵ *Id.* § 78A-7-102(5)(d).

¹³⁶ UTAH CONST. art. V, § 1.

¹³⁷ § 10-1-201; see *id.* §§ 10-1-104, -3b-101 to -3b-403.

¹³⁸ *Id.* §§ 10-3b-201 to -203.

Utah's Supreme Court has articulated a three-part test to determine whether a law violates separation of powers mandated by the Utah Constitution.

First, are the [actors] in question "charged with the exercise of powers properly belonging to" one of the three branches of government? Second, is the function that the statute has given the [actors] one "appertaining to" another branch of government? The third and final step in the analysis asks: if the answer to both of the above questions is "yes," does the constitution "expressly" direct or permit exercise of the otherwise forbidden function? If not, article V, section 1 is transgressed.¹³⁹

Utah's justice courts do not pass this three-part test.

First, because of Title 10's limitations, justice courts must operate under the supervision of the executive or legislative branch of the municipality.¹⁴⁰ As organized, Utah justice courts essentially operate as an administrative agency.

Second, title 78A, chapter 7, of the Utah Code gives justice court judges the "same authority regarding matters within their jurisdiction as judges of courts of record."¹⁴¹ These powers include the ability to hear and determine controversies between adverse parties and questions in litigation,¹⁴² and to "enter final judgments and orders or impose sentence."¹⁴³ These functions are the core powers of the judicial branch.

Third, article V, section 1 of the Utah Constitution, states that "[t]he powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others"¹⁴⁴

In other words, the constitution does not expressly permit or direct the exercise of the core judicial powers to an administrative agency. But since this is the only way justice courts may be operated, unless the municipality in question desires to operate outside of Title 10, "article V, section 1 is transgressed."¹⁴⁵

2. *Amending to Infractions*

The second separation of powers problem occurs when justice courts allow prosecutors to amend misdemeanor charges to crimes that have not been enacted by the Utah Legislature. Specifically, prosecutors improperly exercise legislative duties by changing misdemeanor crimes to infractions, and judges allow this to

¹³⁹ W. Jordan v. Goodman, 135 P.3d 874, 881 (Utah 2006).

¹⁴⁰ See §§ 10-1-201, 10-3b-201 to -3b-202.

¹⁴¹ *Id.* § 78A-7-104.

¹⁴² Citizens' Club v. Welling, 27 P.2d 23, 26 (Utah 1933).

¹⁴³ Salt Lake City v. Ohms, 881 P.2d 844, 848 (Utah 1994).

¹⁴⁴ UTAH CONST. art. V, § 1.

¹⁴⁵ W. Jordan v. Goodman, 135 P.3d 874, 881 (Utah 2006).

occur. For example, Utah's legislature defines assault as a Class B misdemeanor.¹⁴⁶ A person convicted of a Class B misdemeanor may serve up to six months in jail.¹⁴⁷ Often, prosecutors in justice court amend misdemeanor assault charges to infractions—with the justice court judge's consent—before trial. It is important to note that the crime of assault, as an infraction, does not exist in the Utah Code. Thus, prosecutors re-define (or tamper with) the possible punishments and due process procedures (meaning right to a jury trial) for crimes that have been clearly outlined by the Utah Legislature. In doing so, members of the executive and judicial branch impermissibly over-step the duties that the United States and Utah Constitutions specifically reserve for the legislative branch of government, resulting in a clear separation of powers problem.

At first glance, it may appear that justice court defendants benefit from reducing their misdemeanor charges to infractions. After all, an infraction conviction carries no possible risk of incarceration and a maximum fine of \$750.¹⁴⁸ Thus, it might be argued that in this instance, one should overlook the separation of powers problem. However, reducing misdemeanor charges to infractions places enormous burdens on defendants that far outweigh any benefits defendants gain from the reduction in offense. Once prosecutors amend the charges to infractions, justice court defendants lose their right to a jury trial, depriving defendants of this fundamental protection.

An additional negative consequence of amending charges to infractions is the deprivation of appointed counsel, since the right applies only to cases in which incarceration is a possibility. Most justice court defendants do not hire an attorney because costs of representation are greater than the maximum fine imposed for an infraction.¹⁴⁹ Ultimately, many justice court defendants proceed ill equipped to battle a legally-trained prosecutor. Thus, amendment to infractions disproportionately affects indigent defendants, who shoulder the costs of hiring counsel when the right to counsel does not apply.¹⁵⁰

Compounding this problem, a guilty verdict may carry significant collateral consequences, such as deportation, loss of student loans, loss of driving privileges, or sentencing enhancements.¹⁵¹ Defendants may be ordered to undergo treatment,

¹⁴⁶ See § 76-5-102. Note that it is a Class B misdemeanor if the assault is “an attempt, with unlawful force or violence, to do bodily injury to another; [or] a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; [or] an act, committed with unlawful force or violence, that causes bodily injury to another.” It is a Class A misdemeanor if “the person causes substantial bodily injury to another; [or] the victim is pregnant and the person has knowledge of the pregnancy.” *Id.*

¹⁴⁷ UTAH CODE ANN. § 76-3-204 (West 2011).

¹⁴⁸ *Id.* §§ 76-3-205, -301.

¹⁴⁹ See Eric S. Peterson, *Nickeled and Dimed: Utah's Justice Courts Exact Their Pound of Flesh*, SALT LAKE CITY WKLY., May 27, 2010 (cover story).

¹⁵⁰ See *Gideon v. Wainwright*, 372 U.S. 335, 343–44 (1963) (establishing the right to counsel guarantees state-provided counsel to indigent defendants).

¹⁵¹ See Sam Newton, *Justice Court Appeals: The Good, the Bad, and the Unintended*, UTAH B.J., Jan.–Feb. 2005, at 22, 25.

costing them thousands of dollars.¹⁵² If the defendant does not comply with these requirements and cannot afford the classes, he could be incarcerated for contempt.¹⁵³ Even though the initial infraction charge did not carry the risk of incarceration as a penalty, noncompliance with justice court orders on an infraction could result in a justice court defendant finding himself in jail.

In sum, justice court defendants suffer greatly when prosecutors act as legislators by amending criminal misdemeanor charges to infractions. The right to a jury trial and appointed counsel are definite and immediate losses that result from prosecutors' actions. But defendants also suffer significant collateral consequences once convicted of infractions in justice court.

Problems with separation of powers do not exist only in the abstract, they have been raised in Utah's courts as well. In *West Jordan City v. Goodman*,¹⁵⁴ the defendant alleged that justice courts violated separation of powers because they were "employed and controlled by the municipalities that benefit from the fines they levy."¹⁵⁵ The Utah Supreme Court dismissed this argument as inadequately briefed, based on the defendant's "scant evidence" and failure to address the relevant test for separation of powers violations.¹⁵⁶ However, though this case was inadequately briefed, the court indicated a willingness to address separation of powers arguments in the future.¹⁵⁷

In a second separation of powers challenge to the justice courts, *Hyde Park City v. Davis*,¹⁵⁸ the Utah Court of Appeals dismissed the case for inadequate briefing.¹⁵⁹ While the defendant made a similar argument to that in *Goodman*, he failed to argue or brief the separation of powers test.

In *Ogden City v. Fernandez*,¹⁶⁰ the defendant challenged an amendment of his misdemeanor domestic violence charges to infractions by a prosecutor two days

¹⁵² See Peterson, *supra* note 149.

¹⁵³ See *id.*

¹⁵⁴ 135 P.3d 874 (Utah 2006).

¹⁵⁵ *Id.* at 876–77.

¹⁵⁶ *Id.* at 877, 883. The court declined to use an amicus curiae brief submitted by the Utah Association of Criminal Defense Lawyers to salvage defendant's arguments. *Id.* at 883.

¹⁵⁷ *Id.* at 883 ("[W]e are not foreclosing future challenges to the validity of the justice court scheme, and in fact, we encourage the legislature to give serious consideration to some of the arguments raised in the amicus brief. It is theoretically possible that a justice court judge may be unable to exercise his judicial functions with the necessary impartiality because of pressure to generate revenue for his municipal employer or that a municipal government may exercise such control over its justice court that it violates fundamental principles of separation of powers. But to prevail on such claims, a defendant would need to support them with specific evidence and cogent legal argument.") (internal citations omitted).

¹⁵⁸ 2009 UT App 39 U.

¹⁵⁹ *Id.* at *3; see also Brief of Appellant, *Davis*, 2009 UT App 39 U (No. 20080055-CA), 2008 WL 6653935 at *29–52 (making the separation of powers argument).

¹⁶⁰ 2006 UT App 279 U.

before trial.¹⁶¹ The trial court denied the defendant's motion for a jury trial and subsequently convicted him.¹⁶² On appeal, the defendant argued that provisions removing his right to a jury trial on infractions violated the Utah Constitution.¹⁶³ The Utah Court of Appeals disagreed, reasoning that defendants do not have a right to a jury trial if the offense carries no possibility of incarceration.¹⁶⁴

Following the suggestion of the Utah Supreme Court, in 2009 the legislature addressed the separation of powers issue by changing justice court judges' appointment and retention process. Today, municipal leaders may no longer hire justice court judges. Instead, justice court nominating commissions appoint justice court judges, which must also be ratified by the local legislative body.¹⁶⁵ Under the new provision, justice court judges are appointed for six-year terms and are retained by popular election.¹⁶⁶ The legislature also removed the city or county executive's ability to fire a judge for "good cause."¹⁶⁷

B. Double Jeopardy, Due Process, and Equal Protection

Independent of the problems with separation of powers, Utah's justice courts have been constitutionally challenged on double jeopardy, due process, and equal protection grounds. In *Bernat v. Allphin*,¹⁶⁸ the defendants challenged the justice court appellate requirement that defendants obtain a certificate of probable cause to stay a justice court sentence.¹⁶⁹ A stay order may be issued by either a justice or a district court.¹⁷⁰ To obtain a stay, a defendant must submit "a memorandum of law" that "raise[s] a substantial question of law . . . reasonably likely to result in

¹⁶¹ *Id.* at *1 & n.1.

¹⁶² *Id.*

¹⁶³ *Id.* at *3 (citing UTAH CODE ANN. § 77-1-6(2)(e) (LexisNexis 2003) and UTAH R. CRIM. P. 17(d)). Defendant alleged a violation of Article I, Section 12 of the Utah Constitution. *Id.*

¹⁶⁴ *Id.* at *4–5 (citing *W. Valley City v. McDonald*, 948 P.2d 371 (Utah Ct. App. 1997)). The court also dismissed the State constitutional argument as inadequately briefed. *Id.* at *3.

¹⁶⁵ See UTAH CODE ANN. § 78A-7-202(2)(d) (LexisNexis 2008 & Supp. 2011). Also, this new process of appointing justice court judges is still different from the means by which district court judges are appointed. See UTAH CONST. art. VII, § 8, cl.1–3. District court judges are first nominated by the Governor and then confirmed by a majority of the Utah State Senate. *Id.*

¹⁶⁶ See § 78A-7-203.

¹⁶⁷ See Justice Court Amendments, S.B. 72, 2008 Gen. Sess. (Utah 2008) (repealing and reenacting UTAH CODE ANN. § 78-5-134(5)) (renumbered as § 78A-7-202).

¹⁶⁸ *Bernat v. Allphin*, 106 P.3d 707 (Utah 2005).

¹⁶⁹ *Id.* at 709. Since the action in *Bernat* was filed, but before the case was decided, Utah Rule of Judicial Administration 4-608 has been repealed and replaced by the procedures outlined the Utah Rules of Criminal Procedure. *Id.* at 709 n.2. Rule 38 addresses "Appeals from justice court to district court" and Rule 27A addresses "Stays pending appeal from a court not of record." UTAH R. CRIM. P. 27A, 38.

¹⁷⁰ See *Bernat*, 106 P.3d at 710.

reversal.”¹⁷¹ If the court agrees and finds that the appeal “is not being taken for the purpose of delay,” then a certificate of probable cause may issue.¹⁷² The defendants argued this process “violate[d] double jeopardy, due process, and equal protection,” each with their own rationales.¹⁷³

The defendants argued that the stay process violated double jeopardy because it did not automatically “wipe the slate clean” and void the justice court judgment while the trial de novo was pending in the district court.¹⁷⁴ Instead, the process placed the defendant in district court having been “convicted of the exact offense he will be tried for a second time.”¹⁷⁵

The Utah Supreme Court dismissed the defendants’ double jeopardy argument for three primary reasons.¹⁷⁶ First, the court reasoned that the defendant, not the state, chooses to appeal.¹⁷⁷ Thus, the State did not pursue a second prosecution for the same offense. Second, when they appeal de novo, defendants cannot receive simultaneous or multiple punishments for the same offense.¹⁷⁸ Finally, a defendant’s jeopardy never terminates and restarts during the process—in essence, he remains in “continuing jeopardy” during the appeal.¹⁷⁹

The defendants claimed the trial de novo process violated due process because it was “extremely burdensome” and “chill[ed] a justice court defendant’s right to appeal.”¹⁸⁰ The Utah Supreme Court, however, rejected this argument, reasoning that the defendants were overly focused on “perceived inadequacies relating to a defendant’s ability to obtain a *stay* of his or her conviction, not on a defendant’s ability to effectively *appeal* his or her conviction.”¹⁸¹ In essence, justice court defendants had an absolute right to an appeal, so long as they properly filed a notice within the thirty-day requirement.¹⁸² The mere fact that a defendant might experience difficulties obtaining a stay of his sentence was “wholly separate from and [had] no impact on a defendant’s ability to appeal his or her conviction.”¹⁸³

¹⁷¹ *Id.* (quoting UTAH R. CRIM. P. 27(d)(2) (2005) (rewritten 2009)).

¹⁷² *Id.* (quoting UTAH R. CRIM. P. 27(f) (2005) (rewritten 2009)).

¹⁷³ *Id.* at 710.

¹⁷⁴ *Id.* at 711.

¹⁷⁵ *Id.*

¹⁷⁶ *See id.* at 711–16.

¹⁷⁷ *See id.* at 714–15.

¹⁷⁸ *See id.* at 715 (explaining that the protections against double jeopardy are “intended ‘to prevent a defendant from being subjected to multiple punishments for the same offense[.]’” but that “[n]one of these policy considerations is implicated under Utah’s system. . . . [T]here is no concern that a defendant could receive multiple punishments in both a justice court and a district court for the same offense.” (quoting *Justices of Bos. Mun. Court v. Lydon*, 466 U.S. 294, 307 (1984))).

¹⁷⁹ *See id.* at 713–14, 716.

¹⁸⁰ *Id.* at 716.

¹⁸¹ *Id.* at 716–17.

¹⁸² *See id.* at 710 (citing UTAH CODE ANN. § 78-5-120(1) (2002)).

¹⁸³ *Id.* at 717 (citing UTAH R. JUD. ADMIN. 4-608(4)). The Utah Supreme Court refused to address other due process concerns raised by defendants because these issues

The defendants also argued that the appeal process violated equal protection “because a justice court defendant maintains a guilty status pending a trial de novo, [and therefore] a justice court defendant is treated differently than a defendant who has obtained a new trial after successfully reversing his or her sentence on appeal.”¹⁸⁴ The Utah Supreme Court, however, did not find an equal protection violation, reasoning that a justice court defendant is more like a district court defendant who first appeals, rather than a district court defendant who obtains a new trial on appeal.¹⁸⁵ Justice court defendants receive more favorable treatment than traditional district court appellants, since they get a “second opportunity to relitigate the facts relating to his or her guilt or innocence after having had the advantage of learning about the prosecution’s case during the first trial.”¹⁸⁶

Despite rejecting all three of the defendants’ arguments, the court stopped short of validating Utah’s justice court system. Specifically, the court noted that a sentence imposed by a nonlawyer judge “could conceivably raise due process concerns”—but that this issue was not properly raised.¹⁸⁷

C. Justice Courts Continue to Focus on Revenue-Generation

Justice courts continue to operate under pressure to generate money for their municipalities or counties. In 2007, Utah’s justice courts generated over \$72 million dollars in revenue and were projected to bring in \$84 million in 2008.¹⁸⁸ In 2010, not one justice court in the state lost money, despite the severe economic difficulties nationwide.¹⁸⁹ Justice courts dispose of 70 percent of all cases filed in Utah’s courts, and of those disposed cases, 82 percent involve traffic offenses, which constitute the type of offense that raises the serious concern that cases are filed and adjudicated in order for municipalities to generate revenue.¹⁹⁰

According to Chief Justice Christine M. Durham, a “growing public perception” exists “that justice courts are vehicles for generating revenue” which

were inadequately briefed or involved a scenario not present in the consolidated cases brought before the Court. *Id.* at 717.

¹⁸⁴ *Id.* at 717.

¹⁸⁵ *Id.* at 717–18.

¹⁸⁶ *Id.* at 718.

¹⁸⁷ *Id.* at 717 n.13 (citing *North v. Russell*, 427 U.S. 328 (1976)).

¹⁸⁸ Christine M. Durham, Chief Justice, Utah Supreme Court, Address at the 2008 State of the Judiciary 8 (Jan. 21, 2008), available at <http://www.utcourts.gov/resources/reports/statejudiciary/2008-StateOfTheJudiciary.pdf>.

¹⁸⁹ See ADMIN. OFFICE OF THE COURTS JUSTICE COURT REVENUE REPORT FY2010 (Jan. 11, 2011).

¹⁹⁰ Durham, *supra* note 188, at 8; Utah Administrative Office of the Courts, *Utah Justice Courts Cases Filed and Disposed July 1, 2008–June 30, 2009 (FY09)*, UTCOURTS.GOV (Sept. 18, 2009), <http://www.utcourts.gov/stats/files/2009FY/justice/0-Statewide.pdf> (reporting that justice courts disposed of 518,330 traffic cases in the 2009 fiscal year).

she explained should “never [be] a proper function for courts as institutions.”¹⁹¹ She continued, expressing a strong concern about the justice courts:

[W]e want the public to perceive that their courts are fair and impartial. Without this perception, there cannot exist an essential element of our form of government — public trust and confidence in the judicial branch There is, in my view, no more pressing problem of public perception regarding Utah’s court system than the justice courts.¹⁹²

Chief Justice Durham implored legislative action. “I urge you to seize this opportunity to reform a system in need of attention and to enhance the public’s confidence in these courts.”¹⁹³

The revenue generation concern is best illustrated by justice court judges’ continued dependence on their municipalities.¹⁹⁴ Utah law authorizes a city to create a justice court, so long as the municipality funds the costs of all court personnel and facilities.¹⁹⁵ In fact, one-half of the revenue from all fines collected is to be given to the municipality that hosts the court and the other half is to be given to the municipality who provides the prosecuting agency.¹⁹⁶ Judges remain city officers, pressured to “make ends meet” for their city. For example, in 2003 the Chief Administrative Officer of Salt Lake City praised city judges for their comparatively high conviction rate as compared to district courts, and then noted the revenue collected from the city’s traffic efforts.¹⁹⁷

In other words, judges may be pressured to provide revenue for their cities. A failure to make money may subject the judge to repercussions, such as lack of administrative support. In 2004, Salt Lake County’s Criminal Justice Advisory Council commissioned a study by the Institute for Law and Policy Planning to examine overcrowding in its jail (the Kalmanoff Study).¹⁹⁸ The Institute pointed out that the “harshest criticism” against justice courts “is that they were established

¹⁹¹ Durham, *supra* note 188, at 8.

¹⁹² *Id.* at 7.

¹⁹³ *Id.* at 10.

¹⁹⁴ See Mike Martinez, *Utah’s Justice Court System, a Legal Charade*, 22 UTAH B.J., Mar.-April 2009, at 27, 31.

¹⁹⁵ See *id.* at 27 (citing UTAH CODE ANN. § 78A-7-101 to -301 (LexisNexis 2010)).

¹⁹⁶ UTAH CODE ANN. § 78A-7-120(1) (LexisNexis 2008).

¹⁹⁷ Martinez, *supra* note 194, at 27 (“In an April 30, 2003 memorandum, the Chief Administrative Officer of Salt Lake City praised city judges for convicting 97 percent of all traffic defendants. This, he wrote, was a great improvement over the paltry 66 percent conviction rate by Third District Court Judges, who decided Salt Lake traffic cases prior to the city implementing its own justice system. The majority of the memorandum discusses additional revenue collected through the higher conviction rates.” (citations omitted)).

¹⁹⁸ INST. FOR LAW AND POLICY PLANNING, SALT LAKE COUNTY CRIMINAL JUSTICE SYSTEM ASSESSMENT (2004) [hereinafter KALMANOFF STUDY], <http://cjac.slco.org/resources/SaltLakeCJSAfinal.pdf>.

as a revenue stream for cities.”¹⁹⁹ Cities may “become dependent on the money generated through enforcement,” the study said, which could pressure judges to “be overly aggressive as a way to meet financial expectations and demands.”²⁰⁰ The study further found that in Salt Lake County, judges and city administrators “freely admit that they believe the justice courts are a source of significant revenue for their cities.”²⁰¹ Increased caseloads helped cities, which viewed the “ultimate” case as “a traffic citation in which the cited person does not contest the citation and mails in his/her payment” since “there is little overhead in such offense transactions but instead, maximum revenue over expense.”²⁰² Cities, Kalmanoff found, “universally . . . view the [justice] courts as a prime revenue source worthy of protection and expansion.”²⁰³

The Utah Supreme Court’s Nehring Commission, headed by Justice Ronald Nehring, found similar problems, and provided several proposals and legislative recommendations.²⁰⁴ To combat the concern that judges were being pressured to generate revenue, the Nehring Commission proposed “[u]ncoupl[ing] the money and the judge” and recommended justice court judges’ salaries be paid by the state according to a fixed schedule.²⁰⁵ A percentage of justice court fines would be diverted to the state under this system, while the municipality would remain obligated to pay its court support expenses.²⁰⁶

The legislature declined to adopt this proposal, but did adopt some of the smaller other changes proposed by the Nehring Commission in the 2008 legislative session.²⁰⁷ Among the proposals adopted was the creation of a new appointment and retention plan for justice court judges that required judges be appointed by a county-wide judicial selection committee and retained by a county-wide retention election every six years.²⁰⁸ Additionally, the legislation mandated that municipalities or counties pay their justice court judges at a rate of no less than 50 percent and no more than 90 percent of the salary of a district court judge.²⁰⁹

¹⁹⁹ *Id.* at 3.8. The study also noted the growth in justice courts “[was] is in large part due to a need for increased revenue . . .” *Id.* at 6.5.

²⁰⁰ *Id.* at 3.8.

²⁰¹ *Id.* at 6.11.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ JUDICIAL COUNCIL, JUSTICE COURT STUDY COMM., INTERIM PROGRESS REPORT 6 (2008) [hereinafter Nehring Commission] (on file with author).

²⁰⁵ *Id.* at 10, 16.

²⁰⁶ *Id.*

²⁰⁷ See Justice Court Amendments, S.B. 72, 2008 Gen. Sess. (Utah 2008).

²⁰⁸ S.B. 72, 2008 Gen. Sess. (repealing and reenacting UTAH CODE ANN § 78-5-134 (LexisNexis 2008), which was subsequently repealed and renumbered as UTAH CODE ANN § 78A-7-202 (LexisNexis 2008)).

²⁰⁹ *Id.* (repealing and reenacting UTAH CODE ANN. § 78-5-128 (LexisNexis 2008), which was subsequently repealed and renamed as UTAH CODE ANN. § 78A-7-206 (LexisNexis 2008)).

The bill solved some, but far from all, of the previous concerns about ties to revenue generation. If the judge could not be hired or fired by the municipality, then she would have no incentive to raise money for the justice court, since the voters (as opposed to municipal administrators) would be unlikely to remove a judge from office for a failure to raise revenue. However, the statute failed to address some key concerns. Changing the hiring and firing procedure does not necessarily alleviate concerns of revenue generation. The problem results in the fundamental nature of justice courts. If the court exists to collect revenue for the municipality, then the judicial hiring and firing procedure fails to address the underlying cause of the problem. Granted, eliminating the municipality's ability to fire might affect the "perception . . . of dominance that elected city officials have over the judiciary they created"²¹⁰ but it fails to address the reality that justice courts are largely revenue-driven, revenue-generating machines. This is because justice court judges are not fully independent judicial officers, even after the amendments.

Moneymaking continues to be a problem because structural revenue generating pressures still exist. Justice court judges remain administrative officers in their cities. The Utah Code requires a justice court judge to comply with county or municipal rules related to "personnel, budgets and other administrative functions."²¹¹ "Failure by the judge to comply with applicable administrative county or municipal rules and regulations may be referred, by the county executive or municipal legislative body, to the state Justice Court Administrator" which shall be considered as part of the judge's performance evaluation.²¹² Under the 2008 revision, a justice court judge may no longer be dismissed for a failure to comply with the city's budgetary requirements. However, her performance evaluation may be adversely impacted if she is not generating revenue. The performance evaluation goes to the public at large in a retention election. Thus, though reforms have separated the explicit revenue generating pressure and incentive structure, revenue generation remains a pressure at an administrative level through performance evaluations.²¹³

These fiscal goals are not speculative. For example, Salt Lake City, the largest city in the state, claimed in fiscal year 2009–2010 that its justice court would generate additional revenues through parking and traffic tickets, partially because

²¹⁰ KALMANOFF STUDY, *supra* note 198, at 6.10.

²¹¹ UTAH CODE ANN. § 78A-7-210(1) (LexisNexis 2008).

²¹² *Id.* § 78A-7-210(2) to -210(3).

²¹³ In March 2012, the Utah Legislature passed another piece of legislation, allowing the Judicial Council to supervise all municipal justice courts. Justice Court Amendments, 2012 Utah Laws, Ch. 205 (S.B. 200) (enacting Utah Code Ann. § 78A-7-103 (West 2009 & Supp. 2012) (effective May 8, 2012)). The bill requires justice courts record their proceedings, have sufficient prosecutors and defense attorneys, court security, courtroom space, and current copies of the Utah Code. *Id.* The Judicial Council may decline to recertify a justice court that fails to comply with these requirements. Utah Code Ann. § 78A-7-103(1)(b)(ii). Unfortunately, the bill did little to address issues of revenue generation.

traffic tickets had increased 31 percent from the prior year.²¹⁴ The city proposed increasing fees for traffic school, parking tickets late fees, traffic pleas in abeyance and small claims, which would result in nearly \$500,000 of additional revenue.²¹⁵

This illustrates the fiscal issues justice courts face: when city budgets are tight, traffic tickets and the work of justice courts can be used to generate additional revenue for the city. In Salt Lake City, increasing fee totals and the number of parking tickets and/or fines would result in significantly increased revenue for the municipality.

The United States Supreme Court has addressed similar concerns, noting that judges who have a “direct pecuniary interest in the outcome” of the case or who are faced with “a possible temptation” to abandon their neutral role as judge would not fill the role mandated by due process.²¹⁶ Similar to Utah’s justice court judges, the Supreme Court held that an executive officer judge could not independently exercise his judicial role given his executive ties to revenue generation: “the mayor’s executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor’s court.”²¹⁷

While the Utah legislature and judiciary have made significant progress by modifying the hiring and firing procedure of justice court judges, the problem remains that cities depend on justice courts for revenue-generation. A judge’s “dependence on fees tends powerfully to undermine his integrity.”²¹⁸ The Utah Supreme Court has made clear that justice court judges must not have financial motivations for their decisions. Yet Utah’s justice court judges may have just such an incentive because they continue to be required to maintain some control of the city’s budgets and remain administrative officers in their respective cities. While justice court judges have some additional degree of independence (because it is now more difficult to hire and fire them), they continue to have financial incentives to keep their courts afloat. Until that fundamental conflict changes significantly, one cannot expect to see concerns about impartiality of the justice courts abated.

D. The Confusion Surrounding De Novo Appeal

Significant uncertainty surrounds the appeal process from the justice courts. In Utah, once a guilty determination is made, a justice court defendant is entitled to a trial de novo appeal to the District Court.²¹⁹ However, there is some debate about

²¹⁴ SALT LAKE CITY DEP’T OF ADMIN. SERVS., CAPITAL AND OPERATING BUDGET FISCAL YEAR 2009–10, at D-33 (2009), available at <http://www.slcgov.com/finance/2010budget/budgetbook10.pdf>.

²¹⁵ See *id.* at B-5, D-33, D-34.

²¹⁶ *Tumey v. Ohio*, 273 U.S. 510, 532, 535 (1927). The Supreme Court later declined to extend this holding to a mayor-justice of the peace whose salary was not dependent on convictions. *Dugan v. Ohio*, 277 U.S. 61, 63 (1928).

²¹⁷ *Ward v. Monroeville*, 409 U.S. 57, 60–62 (1972).

²¹⁸ Smith, *supra* note 45, at 121.

²¹⁹ See UTAH CODE ANN. § 78A-7-118 (LexisNexis 2008 & Supp. 2011); see also UTAH R. CRIM. P. 38(b). The District Court procedures that are to be followed when a

the nature of the de novo appeal under Utah law. Under one perspective, a defendant who files an appeal literally begins with a clean slate in the district court with no deference given to the justice court ruling.²²⁰ The prior justice court's judgment is nullified and it is as if all prior proceedings never occurred.²²¹ Also under this interpretation, a defendant's presumption of innocence reattaches.²²²

The other, less robust, perspective sees the justice court judgment as valid, "and the defendant is merely entitled to an appeal which takes the form of a retrial in the district court, after which the justice court judgment is replaced."²²³ Instead of returning the presumption of innocence to the defendant upon a trial de novo appeal, merit is given to the justice court's determinations, and most importantly to determinations regarding guilt.

Utah's case law supports the first view—that the trial de novo process restarts the case anew and returns a defendant's presumption of innocence.²²⁴ In *State v. Hinson*,²²⁵ the Utah Court of Appeals stated, "because the justice court is not a court of record, the 'appeal' does not involve a review of the justice court proceedings."²²⁶ Thus, "[t]he district court neither reverses nor affirms the judgment of the justice court, but renders a new, distinct, and independent judgment."²²⁷ In *Dean v. Henriod*,²²⁸ the Utah Court of Appeals stated that in a trial de novo appeal, the defendant "essentially get[s] a fresh start" and the case is "tried in the district court as if it originated there."²²⁹ Thus, in a trial de novo appeal, "the district court is 'not acting in a typical appellate capacity.'"²³⁰ The Utah Supreme Court held that although de novo review is "a form of appellate review," the state must prove guilt "as it would had the case originated there," and that the justice court's proceeding "plays no part in the trial de novo, except that a district court is prohibited from imposing a harsher sentence than that imposed by the justice court."²³¹

justice court defendant exercises his trial de novo appeal rights are found in Rule 38(e) of the Utah Rules of Criminal Procedure. See UTAH R. CRIM. P. 38(e). Once in the district court, a justice court defendant may not receive a more severe sentence than the justice court imposed. *Wisden v. Dist. Court of Sevier Cnty.*, 694 P.2d 605, 606 (Utah 1984). On appeal the district court's findings are final and may not be further appealed unless the district court ruled on the constitutionality of a statute or ordinance. *Pleasant Grove City v. Orvis*, 157 P.3d 355, 358 (Utah Ct. App. 2007).

²²⁰ See *Bates*, *supra* note 96, at 746.

²²¹ *Id.*

²²² See *id.*

²²³ *Id.*

²²⁴ See *Taylorville City v. Adkins*, 145 P.3d 1161, 1163 (Utah Ct. App. 2006).

²²⁵ *State v. Hinson*, 966 P.2d 273 (Utah Ct. App. 1998).

²²⁶ *Id.* at 275.

²²⁷ *Id.* at 276.

²²⁸ *Dean v. Henriod*, 975 P.2d 946 (Utah Ct. App. 1999).

²²⁹ *Id.* at 949 (citations omitted).

²³⁰ *Id.* at 949 n.1 (quoting *Hinson*, 966 P.2d at 276).

²³¹ *Bernat v. Allphin*, 106 P.3d 707, 715–16 (Utah 2005). The court in *Bernat* also emphasized that the lack of record is critical to interpreting the meaning of a trial de novo

It could be complained that allowing a clean state on appeal actually advantages justice court defendants because they get “two bites at the apple” to avoid conviction. A strong notion of de novo rights, however, does not give justice court defendants an undue advantage over district court defendants; rather, this view attempts to equalize the playing field. Justice courts are not courts of record. With no official court record, a justice court defendant cannot use a witness’s prior statement against the witness at the second trial, but also cannot expose judicial misconduct that occurs. Therefore, a defendant cannot safeguard the procedural inadequacies that occur in those courts. Thus, justice court defendants *should* receive two bites at the proverbial apple, because their first bite may well be into a rotten apple.

Ultimately, a strong de novo right is preferable to a watered-down right precisely *because* district court defendants have a more robust appellate right compared to justice court defendants. District court defendants have an automatic right to appeal their case to a court of appeals. While the facts of any case are not retried in the appellate court, district court defendants are entitled to a panel of three judges who will review a transcript of the entire proceedings conducted at the trial level. Because district court proceedings are courts of record, appellate judges can scour the entire trial court proceeding to ensure that the defendant received a fair trial. Justice court defendants do not get the opportunity to have the record reviewed on appeal. Thus, the strong de novo position partially overcomes the procedural inadequacies faced by justice court defendants. However, even a strong concept of trial de novo may fail to provide the justice court defendant with the appellate rights equal to a district court defendant due to initial justice court procedural inadequacies, namely the inability to appeal the decision beyond the district court, decisions rendered by a nonlawyer judge, lack of a written record to review at the district court level, and reduced access to appointed counsel.

appeal. *Id.* at 716 (“Because Utah justice courts are not ‘courts of record,’ it is not only constitutionally permissible to allow a defendant the opportunity to relitigate his or her case anew, but practically and reasonably sound.”).

E. Problem of the Appellate Stay Procedure

Until 2012, Utah had no automatic provision for vacating sentences imposed by justice courts.²³² Before 2012, Rule 27A(a) of the Rules of Criminal Procedure came closest to requiring an automatic stay—it requires justice court judges to stay sentences if the incarceration period was for less than thirty days.²³³ But the rule also required justice court defendants sentenced to periods of incarceration over thirty days to petition the justice court and to obtain a stay from that court and then deal with myriad procedures to perfect the stay process.²³⁴ The rule allowed justice court judges to refuse to stay sentences if they found that the defendant posed an identifiable risk to the safety to others or the community, or that there was a lack of legal basis for the appeal.²³⁵

Rule 27A created several problems. The first problem is that the procedures contradicted the concept of trial de novo. That is, Rule 27A gave merit to the justice court determinations, and, under Utah case law, a trial de novo appeal means that the district court tries the case “unfettered by [the justice court’s] prior factual findings.”²³⁶ Thus, once a defendant files an appeal, due process should require an automatic stay of the justice court’s determinations.

The second problem was that Rule 27A violated equal protection guarantees of the Utah and United States constitutions because it failed to treat all justice court defendants equally. Similarly situated persons should be treated alike. However, Rule 27A created an arbitrary distinction or litmus test at the thirty-day mark by outlining different procedures depending on whether the defendant was sentenced to jail time of thirty days or more.²³⁷ For incarceration of less than thirty days, the defendant’s filing of a notice of appeal amounted to a motion to stay his sentence.²³⁸ Thus, the defendant did not need to file anything other than his notice of appeal in order to have a judge consider a stay of his incarceration. Furthermore, within two days of receipt of the notice of appeal, a justice court judge had to order

²³² See generally UTAH R. CRIM. P. 27A.

²³³ See UTAH R. CRIM. P. 27A(a)(1) (“The filing of a notice of appeal pursuant to Rule 38, from a judgment that includes a term requiring the defendant to actually serve a period of incarceration of less than 30 days is, unless a defendant indicates differently in writing, also a motion to stay such term of sentence. No further written motion or application is necessary.”).

²³⁴ See *id.* at 27A(b), 38.

²³⁵ *Id.* at 27A(a)(3).

²³⁶ See *Taylorville City v. Adkins*, 145 P.3d 1161, 1163 (Utah Ct. App. 2006).

²³⁷ Compare UTAH R. CRIM. P. 27A(a) (providing procedures for obtaining a stay of sentence for defendants sentenced to less than 30 days of incarceration), with *id.* at 27A(b) (providing different procedures for obtaining a stay for defendants sentenced to greater than thirty days of incarceration).

²³⁸ See *Id.* at 27A(a)(1) (“The filing of a notice of appeal pursuant to Rule 38, from a judgment that includes a term requiring the defendant to actually serve a period of incarceration of less than 30 days is, unless a defendant indicates differently in writing, also a motion to stay such term of sentence. No further written motion or application is necessary.”).

a stay of the term of incarceration and release the defendant. The terms of release had to be the least restrictive that would “reasonably assure the appearance of the person as required and the safety of persons and property in the community.”²³⁹ A justice court judge could refuse to order the release of a defendant if the judge provided a written order “indicating why the defendant poses an identifiable risk to the safety of another or the community and that the period of incarceration, and no less restrictive alternative, is necessary to reduce or eliminate that risk.”²⁴⁰ In addition, a justice court judge could elect to not release the defendant if the judge provided written findings that the “appeal does not appear to have a legal basis.”²⁴¹

In cases where the justice court defendant was serving a sentence that entails a period of incarceration of thirty days jail or more, the defendant was required to file not only a notice of appeal, but also file a written motion requesting the stay of his incarceration.²⁴² He had to accompany his motion to stay with a memorandum that outlined the legal basis for the appeal, and he had to also state that delay was not the purpose of the appeal. The defendant had to further outline why he was not a flight risk and why he did not pose a danger to people in the community.²⁴³ Once filed, the prosecuting attorney could contest the defendant’s motion. Provided filing deadlines are met, a hearing would follow.²⁴⁴ If the justice court approved the defendant’s appeal, the court had to release the defendant unless it found by a preponderance of the evidence that the defendant was a flight risk or danger to the community.²⁴⁵ This was in contrast to the “least restrictive conditions” to be imposed on defendants contesting jail time of less than thirty days. Also, the justice court judge could amend its release order and impose additional or different release conditions for good cause.²⁴⁶

No constitutional provision or Utah law supports giving a stronger de novo right to some justice court defendants over others. But, rather than giving all justice court defendants the same right to de novo review, Rule 27A favored defendants with lower sentences over those who received harsher sentences.

In the 2012 general legislative session, Utah’s Legislature weighed into this issue, but ultimately fell far short of fixing the confusion regarding de novo appeals.²⁴⁷ SB 214, titled “Justice Court Process Amendments,” sponsored by Curt Bramble, set out to reform Utah’s de novo appeal. The text of the original bill would have required that “[u]pon filing a proper notice of appeal in district court

²³⁹ See *id.* at 27A(a)(2).

²⁴⁰ *Id.* at 27A(a)(3)(A).

²⁴¹ *Id.* at 27A(a)(3)(B).

²⁴² *Id.* at 27A(b)(1); see also *id.* at 38(b) (stating deadline and content requirements).

²⁴³ *Id.* at 27A (a)(3)(A).

²⁴⁴ *Id.* at 27A(b)(2).

²⁴⁵ *Id.* at 27A(b)(3)(A)–(B).

²⁴⁶ *Id.* at 27A(d). The justice court judge is barred from amending once the district court judge assigned to the appeal has scheduled or commenced hearings on a petition for relief from a dissatisfied party. *Id.* at 27A(d)–(e).

²⁴⁷ See Justice Court Process Amendments, Sub. S.B. 214, 59th Leg., Gen. Sess. (Utah 2012) (as passed by Senate, Mar. 16, 2012).

for a trial de novo, any sentence imposed by a justice court shall be immediately stayed.”²⁴⁸ This original language was soon substituted with language that guaranteed an automatic stay, “unless at the time of sentencing the judge finds by a preponderance of the evidence that the defendant poses a danger to another person or the community.”²⁴⁹ Also falling short of a true de novo appeal, SB 214 provides that even if a sentence is stayed, justice court judges may order “post-conviction restrictions on the defendant’s conduct as appropriate, including: (a) continuation of any pre-trial restrictions or orders; (b) sentencing protective orders under Section 77-36-5.1; (c) drug and alcohol use; (d) use of an ignition interlock; and (e) posting appropriate bail.”²⁵⁰ The substitute bill then concludes by exempting convictions for offenses under Title 41, Chapter 6a, Part 5 Driving Under the Influence and Reckless Driving.²⁵¹

SB 214 does nothing but further muddy the already murky waters of Utah’s justice court system. While the original SB 214 would have brought Utah into compliance with basic federal due process mandates, SB 214 abandoned this promise by adding a metering system to determine when an automatic stay would apply, decided by the same judges from which the entire problem flows. Although the bill seems to promise an automatic stay, justice court judges appear to retain the ability to deny the essence of the stay—a defendant’s freedom—for a host of easily met requirements.

SB 214 also exacerbates the equal protection problem at issue in Rule 27A. While the bill arguably gives most justice court defendants the right to an automatic stay, defendants convicted of DUIs are treated differently than those convicted of domestic violence or other serious misdemeanor offenses. With regard to DUIs, presumably Rule 27A would still apply. With Rule 27A, an arbitrary line was drawn in the sand differentiating misdemeanants who received less or more than thirty days’ incarceration. Under SB 214, the new arbitrary line in the sand was drawn for DUI convictions and non-DUI convictions. Unfortunately, neither line complies with the constitutional requirement of equal protection since there the law lacks a rational basis to distinguish a DUI misdemeanant from a domestic violence misdemeanant.

While Utah’s legislature again tackled the appellate stay requirement—and made some progress in that area—it ultimately fell short of providing an adequate stay procedure that complies with constitutional commands of due process and equal protection.

²⁴⁸ *Id.* (as introduced, Feb. 22, 2012) (adding this language to Utah Code Ann. § 78A-7-118(2)).

²⁴⁹ *Id.* (as amended, Feb. 24, 2012) (adding this language to Utah Code Ann. § 77-20-10(4)).

²⁵⁰ *Id.* (as enrolled, Mar. 16, 2012) (adding this language to Utah Code Ann. § 77-20-10(5)).

²⁵¹ *Id.* (as enrolled, Mar. 16, 2012). Ironically, the defendant in *North v. Russell* was charged with DUI. See 427 U.S. 328, 329 (1976); *infra* notes 265–267 and accompanying text.

*F. Justice Court Judges Are Not Legally Trained,
But Preside over Relatively Serious Justice Court Offenses*

*I don't know anything more about the law than a hog does about the Fourth of July.*²⁵²

Justice court judges need legal training, and their lack of it raises serious problems. The Sixth Amendment to the United States Constitution guarantees the right of the accused in criminal prosecutions to “have the Assistance of Counsel for his defense.”²⁵³ Starting with *Powell v. Alabama*²⁵⁴ and continuing through *Gideon v. Wainwright*²⁵⁵ and *Argersinger v. Hamlin*,²⁵⁶ the United States Supreme Court has reaffirmed the accused’s fundamental right to assistance of counsel.²⁵⁷ “[T]he essential presupposition of [this right] is that the judge conducting the trial will be able to understand what the defendant’s lawyer is talking about.”²⁵⁸

The Utah Supreme Court has conceived that due process concerns would be too great to justify having nonlawyer judges preside over criminal cases.²⁵⁹ Most courts that have upheld these systems have done so only after finding that sufficient safeguards existed to remedy the due process concerns.²⁶⁰

The leading case regarding due process concerns with nonlegally trained judges in criminal cases is *Gordon v. Justice Court*.²⁶¹ In *Gordon*, the California Supreme Court was asked to determine if provisions allowing nonlawyer judges to preside over criminal matters were constitutional.²⁶² The court found that misdemeanor trials involve sufficiently complex legal and constitutional issues that

²⁵² C.B.S., *supra* note 50, at 1454 (quoting Justice Vernon Hilliard).

²⁵³ U.S. CONST. amend. VI.

²⁵⁴ 287 U.S. 45, 73 (1932).

²⁵⁵ 372 U.S. 335, 343–46 (1963).

²⁵⁶ 407 U.S. 25, 37 (1972).

²⁵⁷ *Id.* at 32.

²⁵⁸ *North v. Russell*, 427 U.S. 328, 342 (1976) (Stewart, J., dissenting).

²⁵⁹ *Bernat v. Allphin*, 106 P.3d 707, 717 n.13 (Utah 2005); *see also* *Gordon v. Justice Court*, 525 P.2d 72, 79 (Cal. 1974) (declaring state provision which allowed nonlawyer judges to preside over criminal cases unconstitutional because nonlawyers handling cases involving detailed and complicated legal issues violates due process protections); *White House v. Whitley*, 979 S.W.2d 262, 268 (Tenn. 1998) (holding that criminal defendants facing possible incarceration have right to law-trained judges).

²⁶⁰ *See North*, 427 U.S. at 339 (upholding the Kentucky two-tiered system of justice allowing nonlawyers to preside over criminal cases because the system provided a *de novo* appeal which automatically vacated the conviction and sentence of the lower court); *Shelmidine v. Jones*, 550 P.2d 207 (Utah 1976) (declining a petition asking for a declaration that Utah’s justice court system—which allows nonlawyer judges to preside over criminal cases—unconstitutional because of a recent statutory change that would provide defendants facing possible jail sentences the right to request a law-trained judge in the justice court).

²⁶¹ 525 P.2d 72.

²⁶² *Id.* at 74.

exceed the expertise a layman can be assumed to possess,²⁶³ resulting in a violation of a defendant's right to a fair trial.²⁶⁴

Following *Gordon*, in *North v. Russell*,²⁶⁵ the United States Supreme Court upheld Kentucky's two-tier criminal justice system, in which defendants were tried by nonlawyer judges, but could appeal for a de novo trial before a lawyer judge.²⁶⁶ The dissent in *North* concerned nonlawyer judges' ability to adjudicate the case at all:

[A] basic constitutional right is that the judge conducting the trial will be able to understand what the defendant's lawyer is talking about. For if the judge himself is ignorant of the law, then he, too, will be incapable of determining whether the charge "is good or bad." He, too, will be "unfamiliar with the rules of evidence." And a lawyer for the defendant will be able to do little or nothing to prevent an unjust conviction. In a trial before such a judge, the constitutional right to the assistance of counsel thus becomes a hollow mockery[,] "a teasing illusion like a munificent bequest in a pauper's will."²⁶⁷

Utah does not require its justice court judges to be legally trained.²⁶⁸ In fact, Utah does not even require its justice court judges be college graduates.²⁶⁹ In *Shelmidine v. Jones*,²⁷⁰ the Utah Supreme Court was asked to declare Utah's two-tiered justice system unconstitutional because it allowed nonlawyer judges to preside over criminal cases.²⁷¹ The *Shelmidine* court declined, emphasizing that legislative action or voter referendum was the proper mechanism to change the state constitution and implement such a change.²⁷² Coincidentally, while this case was pending the legislature amended the law to allow "a person charged with an

²⁶³ *Id.* at 75. These issues and complexities would include recognizing relevant issues, determining if an activity is protected, ruling properly on the admissibility of evidence, determining the prejudicial effects of evidence and argument, determining voir dire of jurors, submitting proper jury instructions, and determining if the accused understands the nature of the charges against him, the elements of the offense, the consequences of their guilty plea, and that there is a basis for the plea, and that the plea is freely and voluntarily made. *Id.* at 77.

²⁶⁴ *Id.* at 75–77; see *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972).

²⁶⁵ 427 U.S. 328, 339 (1976).

²⁶⁶ *Id.* at 328–31 (internal quotations omitted).

²⁶⁷ *Id.* at 342–43 (quoting *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring)).

²⁶⁸ UTAH CONST. art. VIII, § 11 ("[N]o qualification may be imposed which requires judges of courts not of record to be admitted to practice law.").

²⁶⁹ UTAH CODE ANN. § 78A-7-201(1)–(2) (West 2008).

²⁷⁰ 550 P.2d 207 (Utah 1976).

²⁷¹ *Id.* at 209.

²⁷² *Id.* at 209–10.

offense which carries a possible jail sentence” the “right to request that the proceeding be handled by a judge who is a member of the state Bar.”²⁷³

Quick legislative action while *Shelmidine* was pending saved Utah’s justice court system by creating a means for defendants to request a legally-trained judge to hear their case. However, that provision has been repealed²⁷⁴ and under current Utah law, there is no longer a protection to allow a “person charged with an offense which carries a possible jail sentence” the right to “request that the proceeding be handled by a judge who is a member of the state Bar.”²⁷⁵ Without these provisions, *Shelmidine* is moot and due process concerns exist as long as justice court judges are nonlawyer judges.

Defenders of nonlawyer justice court judges incorrectly assume that justice courts only handle simple cases, like dog bites or traffic offenses.²⁷⁶ In reality, justice courts frequently handle serious offenses and impose serious penalties on defendants. Justice court judges have jurisdiction over Class B and C misdemeanors and infractions.²⁷⁷ Class B misdemeanors carry a maximum of six months in jail and include offenses of domestic violence, theft, and DUI. All of these charges may be subsequently enhanced to felonies.²⁷⁸ Not only may justice court convictions be enhanced, but justice court defendants face several collateral consequences, such as deportation,²⁷⁹ loss of student loans, or loss of gun rights.²⁸⁰

The Utah Court of Appeals and Utah Supreme Court addressed the potential serious consequences in *Salt Lake City v. Newman* in 2005²⁸¹ and 2006.²⁸² The defendant in the case was an active duty member of the military charged in justice court with battery, a Class B misdemeanor as designated by a Salt Lake City ordinance.²⁸³ The battery carried a domestic violence label, and Newman faced

²⁷³ *Id.* at 211.

²⁷⁴ See UTAH CODE ANN. § 78A-7 (West 2011).

²⁷⁵ *Id.*; *Shelmidine*, 550 P.2d at 211.

²⁷⁶ Bates, *supra* note 96, at 739 (“The use of non-lawyer judges in not particularly problematic because in such areas most of the minor issues are sufficiently simple and repetitive such that a legal education is unnecessary.”).

²⁷⁷ UTAH CODE ANN. § 78A-7-106(1).

²⁷⁸ For instance, after two misdemeanor DUI convictions, the subsequent DUI may be charged as a Third-degree felony, which carries a penalty of up to five years in prison. § 41-6a-503(2) (West 2011).

²⁷⁹ See 8 U.S.C. § 1101, 1227(a)(2)(E)(i) (2006).

²⁸⁰ See 18 U.S.C. § 922(g)(9) (“It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence . . . to ship . . . or possess . . . any firearm or ammunition . . .”).

²⁸¹ 113 P.3d 1007 (Utah Ct. App. 2005).

²⁸² 148 P.3d 931 (Utah 2006).

²⁸³ See SALT LAKE CITY, UTAH, CODE § 11.08.020 (2002) (“A battery is any wilful and unlawful use of force or violence upon the person of another. It is unlawful for any person to commit a battery within the limits of the city.”); see also *Newman*, 113 P.3d at 1010 (stating battery statute at the time of the alleged violation).

potential discharge if convicted.²⁸⁴ Newman alleged that the city's battery ordinance conflicted with the state code's assault provision; the justice court denied his motion.²⁸⁵ Newman wanted to appeal the justice court's decision, but could only do so by pleading guilty and appealing to the district court. However, a guilty plea would have rendered him unable to bear a firearm, which Newman worried would make him unable to perform his military duties and lead to his discharge.²⁸⁶ He pursued an extraordinary writ. The appeals court held that Mr. Newman faced "permanent and extraordinary" "negative consequences" from the de novo appellate process and agreed to review the case.²⁸⁷ The Court of Appeals ruled against Newman's statutory interpretation and the Utah Supreme Court upheld the decision.²⁸⁸ While *Newman* ultimately addressed issues of statutory construction, the case illustrates the potential severity of consequences that justice court defendants may confront.

Utah continues to have problems because it allows nonlawyer judges to adjudicate serious criminal offenses. By allowing nonlawyer judges to decide cases, courts overlook the seriousness of the charges that defendants face. These courts support a grave inconsistency: they mandate effective assistance of counsel but do not mandate that the judge deciding the case be effective as well. Utah courts have upheld statutes allowing nonlawyers to act as justice court judges on grounds that they handle only minor cases.²⁸⁹ However, *Newman* demonstrates that justice court cases can involve offenses with potentially serious consequences. Utah's justice court judges need legal training not only because they may be called upon to interpret the law, but also because they impose sentences and convictions which may greatly affect a defendant's future.

²⁸⁴ *Newman*, 113 P.3d at 1009. This would bar the defendant from serving in the military because he could no longer possess a firearm. See 18 U.S.C.A. § 922(g)(9) (West 2004) ("It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor or crime of domestic violence . . . to ship . . . or possess . . . any firearm or ammunition.").

²⁸⁵ *Newman*, 113 P.3d at 1011; see also UTAH CODE ANN. § 76-5-102(1) (LexisNexis 2012 & Supp. 2008) ("Assault is: (a) an attempt, with unlawful force or violence, to do bodily injury to another; . . . or (c) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.").

²⁸⁶ *Newman*, 113 P.3d at 1007, 1009; *Salt Lake City v. Kusse*, 93 P.2d 671 (Utah 1938).

²⁸⁷ *Newman*, 113 P.3d at 1009–10.

²⁸⁸ *Salt Lake City v. Newman*, 148 P.3d 931, 934 (Utah 2006) ("The mere fact that the state battery statute does not criminalize such behavior does not suggest that the legislature intended to authorize such behavior. Rather, the legislature may have simply intended to leave the regulation of such behavior in the hands of local governments, an intent entirely consistent with Utah Code section 10-8-47, the statute authorizing municipal regulation of assault and battery.").

²⁸⁹ *Shelmidine v. Jones*, 550 P.2d 207, 211 (Utah 1976).

G. Punishments Do Not Fit the Crime

Utah's justice courts continually overuse punitive sanctions. In 2004, the Kalmanoff study found that justice courts overused the Salt Lake County jail, "often resulting in excesses."²⁹⁰ Fifty-two percent of jail inmates were district court felony cases, while forty-three percent of the jail's population came from justice courts on low-level offenses.²⁹¹ "Most of these [offenders from justice courts] can be considered low risk and non-threatening, and certainly not the type of offenders that should be consuming valuable bed space in a maximum security jail."²⁹² Every inmate sentenced to a "jail or pay" sanction came from a justice court (8 percent of the jail's population).²⁹³ "The average sentence imposed for 'jail or pay' was sixty-six days and the average amount owed was \$944."²⁹⁴ Thus, justice court judges take relatively minor offenses and overuse incarceration as a sanction.

Justice court judges knew they significantly contributed to the jail's population, yet only a "handful" were willing to consider alternatives to incarceration.²⁹⁵ The judges felt "frustrated" the study said, that the jail would release their offenders early, and so imposed consecutive sentences in order to keep many low-level offenders in custody.²⁹⁶

Part of the problem involves a lack of perspective. The most serious offenses justice court judges see are DUIs or domestic violence, compared with district courts that handle more violent and serious crimes. For the justice court judge, however, the DUI or domestic violence offender becomes a significant danger to

²⁹⁰ KALMANOFF STUDY, *supra* note 198, at 2. In 2001, the Salt Lake County Auditor examined municipalities' use of the jail and concluded that several cities overused the jail in relationship to their population. CRAIG B. SORESENSEN, A PERFORMANCE AUDIT OF THE SALT LAKE COUNTY JAIL 18–20 (2001). The auditor found that five of the fifteen cities in Salt Lake County accounted for 86 percent of the jail's municipal usage. *Id.* From 1997 to 2000, these five cities' use of the jail increased by 104 percent to 878 percent. KALMANOFF STUDY, *supra* note 198, at 3.9. "South Salt Lake [City] and Midvale, while two of the smallest cities in the County, were the first and third in jail usage per capita." *Id.*

²⁹¹ KALMANOFF STUDY, *supra* note 198, at 2.3. Specifically, the jail's population broke down as follow: Felony 1: three percent, Felony 2: ten percent, Felony 3: twenty-five percent, Misdemeanor A: thirteen percent, Misdemeanor B: forty percent, and Misdemeanor C: nine percent. *Id.*

²⁹² *Id.* at 6.9.

²⁹³ *Id.* at 2.21. In fact, Utah's constitution may well prohibit a "jail or pay" sanction. It prohibits "imprisonment for debt except in cases of absconding debtors." UTAH CONST. art. I, § 16.

²⁹⁴ KALMANOFF STUDY, *supra* note 198, at 2.21. The cost to incarcerate an individual in Salt Lake County was around \$69 a day in 2001. *Id.* at 2.21 n.12. A sixty-six day jail commitment would cost County taxpayers \$4,554, nearly five times the average amount owed by the offender. *Id.*

²⁹⁵ *Id.* at 6.10; *see also id.* at 3.9 ("The municipalities and the Justice Courts greatly rely on the Metro Jail" and use it "essentially with little restriction and complete financial impunity.").

²⁹⁶ *Id.* at 6.10.

the community who deserves a steep punishment such as incarceration. As a result many judges tend to impose the maximum sentence possible, 180 days jail time. Penalties for multiple counts are often imposed consecutively. However, though this offender might be a danger to the community, his level of offense is significantly less than felons who are seen in district court and who does not deserve as severe a sanction.²⁹⁷

Additionally, the variation in punishment among justice courts can be drastic. For example, the average length of a jail sentence imposed by a Holliday justice court was 344 days compared to twenty-two days for the South Salt Lake Justice Court.²⁹⁸ South Salt Lake City filed cases at a rate of ninety-five per 1,000 residents, while on the opposite end of the spectrum, Draper filed cases at a rate of five per 1,000 residents.²⁹⁹ The average felony sentence amounted to over 300 days, while justice court defendants' sentences averaged around eighty-three days.³⁰⁰ The Taylorsville Justice Court sentenced its defendants to an average sentence of 180 days, while the Draper Justice Court sentenced its defendants to stays averaging thirty-four days.³⁰¹

Because of the abuses, largely in justice courts, the Institute made several recommendations for reform, including automatic appeal for disproportionate sentences from justice courts,³⁰² institution of a community service program to allow defendants to work off sentences (rather than sit in jail),³⁰³ creation of sentencing guidelines for Class B and C misdemeanors,³⁰⁴ and jail management policies such as quotas,³⁰⁵ and charging the municipality a per diem for incarceration of defendants for certain minor offenses.³⁰⁶

Utah uses justice courts to bring a local flavor to its process. However, the problems created with locally administered justice result in significant constitutional violations and deprivations to the rights of defendants. Consequently, the system needs reformation.

²⁹⁷ *Id.* at 3.4 (“To some degree, this occurrence is a natural development within the Justice Courts as certain offenses or offenders emerge as major issues for the court, impacting their sense of internal relativity.”).

²⁹⁸ *Id.* at 2.18.

²⁹⁹ *Id.* at 3.22.

³⁰⁰ *See id.* at 2.19–20.

³⁰¹ *Id.* at 2.20.

³⁰² *Id.* at 6.26. This would result, the study said, in having the district court hear the cases, which would cause “standardized sentencing” and “predictable timelines as well as reduced incarceration costs.” *Id.* While this would increase the district courts’ calendars temporarily, it would cause “sentencing and timelines in the justice courts [to] fall into more of a middle-position norm.” *Id.*

³⁰³ *Id.* at 6.20.

³⁰⁴ *Id.* at 8.5.

³⁰⁵ *Id.* at 6.13.

³⁰⁶ *Id.* at 3.12.

III. PROPOSED SOLUTIONS TO THE PROBLEMS OF UTAH'S JUSTICE COURTS

The numerous and persistent problems inherent to the justice courts demand significant reform. The failure to address them deprives Utah's citizens of constitutional rights and undermines the legitimacy of the courts. To remedy these serious problems, Utah should abolish its justice courts. Alternatively, if justice courts must remain, Utah should implement several reforms to protect the integrity of the judicial system and those who find themselves within it.

A. Abolish Justice Courts Statewide and Replace Them with Magistrate Courts under the State System

The most logical solution to the courts' problems and clearest course of action would be to abolish the courts in their entirety. Indeed, abolition has been the most-often proposed remedy since the courts' inception.³⁰⁷ The history of justice courts reveals that the reasons for their creation no longer exist. Justice courts were created for a society in which the rule of law was less important than a sense of community justice. Members of rural America preferred a system in which nonlawyers would resolve disputes in a down-to-earth, practical, nonlegal way. When justice courts were created, lawyers were few in number and court buildings were few and far between.

Today, every one of these justifications has been eliminated. The complexities of the law show that legal training for justices is essential, and indeed important to maintain the integrity of the justice system. Moreover, we no longer have a shortage of lawyers: Utah has thousands of lawyers and admits hundreds to the bar annually. Utahns no longer live in a time in which people lack access to the courts. The advent and growth of automobiles makes it possible to travel the length and breadth of the state in half a day. The Internet and other technologies enable courts to communicate with people remotely. Thus, when people are unable to travel to the court, the court has the capacity to go to the people, like Utah's current practice of conducting arraignments at the jail via video monitor. Additionally, the history of the justice courts reveals that they are staffed all too frequently by nonlawyers who, when given the opportunity, abuse and overstep their authority.

Moreover, abolition ensures judicial independence. Municipalities could no longer press their revenue-generation goals onto their justice courts, since judges would act as state employees, with all the benefits and independence established with that position. Abolition ensures that only legally trained judges have the heavy responsibility of deciding criminal cases. It also reins in the problem of excessive and uneven punishment for crimes. Utah would be wise to follow the majority of states in the United States and abolish its justice of the peace courts. Indeed, Utah's own legislative commission recommended this solution nearly four decades ago after an intensive, multi-year study.³⁰⁸

³⁰⁷ See *supra* Part I.

³⁰⁸ See UTAH LEGISLATIVE COUNCIL, *supra* note 97, at 19.

Of course, abolition of the justice courts will leave a gap in the justice system. To fill this void, the state could create a magistrate court system filled with legally trained judges. These legally trained magistrates would possess the authority to handle misdemeanor and felony initial appearances, much in the same way that matters are handled in federal court. In this way, magistrates would function in a manner similar to the way justice court judges function today. A district court magistrate, as a state employee, could handle the tens of thousands of misdemeanor crimes now filed and handled by the justice courts.

However, to ensure Utah avoids future problems, several fundamental changes must also accompany abolition of the justice court system and the creation of the magistrate courts. First, magistrates' decisions must be appealable to the district court, similar to a traditional appeal. Because district court proceedings are "on the record," there would be no entitlement to a de novo appeal, but rather an appeal that more closely resembles the appeals process from a federal magistrate court. The district court judge could review the record, entertain motions and arguments and rule on the constitutionality of the trial below. After appeal to the district court, the party may pursue a writ of certiorari for a discretionary appeal to the Utah Supreme Court. This system would reduce the appearances a witness would be required to make in court or for discovery because of the existence of a reliable record. Above all, such a process would protect defendants' and society's rights and interests.

Second, the new magistrate judges must be legally trained. This will ensure that the judge understands both the nuances of the case and the law itself, and it will prevent arbitrary decisions and sentences. The new courts should have little problem attracting qualified candidates to serve because magistrate judges would get the benefit of a steady job and the prestige associated with being a state court judge, to say nothing of a state salary and benefits.

In sum, if Utah were to abolish the justice courts and put all courts under a single statewide umbrella, the benefits to its citizens would greatly outweigh any costs associated with individual municipalities determining on a varied basis how they will deliver criminal justice services.

B. Alternatively, the Following Reforms Should Be Made to the Justice Courts

Many do not favor completely abolishing justice courts, frequently arguing that their benefits offset their downsides.³⁰⁹ If the state of Utah is not fully

³⁰⁹ For example, in 2008, Salt Lake City Chief Justice Court Judge Virginia Ward argued that the justice court was "more accessible in every way" and that the costs of having to appeal cases were quite minimal: the "200 [appealed] cases need to be balanced against the 54,250 for which no additional resources are expended." SALT LAKE CITY, JUSTICE COURT FACT SHEET 10 (2008) (reporting to the Salt Lake City Council on June 10, 2008). She argued that "[t]here are costs, but they should be balanced against the gain to citizens of having speedy trials, to the City of not having District Court judges refuse to give due efforts to City cases, to having judges who will not deny the City's right to present misdemeanor cases." *Id.*

committed to abolishing the courts, then it should implement the following reforms.

1. Establish an Independent Judiciary

Utah must insulate its judiciary from political pressure. In short, Utah Code section 78A-7-210 should be amended to remove the requirement that justice court judges comply with applicable county or municipal rules and regulations related to personnel, budgets, and other administrative functions, so that judges no longer feel administrative pressures to maintain budgets through court fees and fines.

Additionally, all justice court judges should be state employees. Title 10 does not provide for a municipal judicial branch of government, and as such the justice courts violate the separation of powers principle. And as discussed above, there are still significant revenue generation pressures on the judges. Rather than amending Title 10 to create a statewide municipal judicial branch, justice court judges should be made state employees. The current method for selecting justice court judges should be preserved, and all court employees, including court managers and court clerks, should remain as currently constituted. To remedy the violation of separation of powers, and to avoid the appearance of impropriety, municipalities should not employ justice court judges.

2. Require Justice Court Judges to be Legally Trained

Any reform must require legal training for justice court judges. Justice courts are no longer the backwoods, justice out of one's home, type of court. Justice courts act as official courts. Judges wear robes and sentence defendants to lengthy periods of incarceration, sometimes for years at a time. These courts have bailiffs, seat juries, are required to follow the rules of evidence, and hear motions to suppress evidence. Justice court judges analyze statutes, rules, and constitutions, and make important legal conclusions. Judges make decisions that dramatically affect the lives of numerous Utahns throughout the state. Moreover, the law, and all its procedural nuances, is complex. Few citizens would want to certify doctors who did not go to medical school. Schooling prepares doctors for the complexities of their practices. Similarly, law school prepares future judges to think like lawyers. We must require those charged with such responsibility to meet certain professional standards and requirements. It is not too much to ask a person in such a position to pass law school and the bar exam in order to demonstrate a capacity to understand and interpret the law. All things being equal, lawyers (taken as a group) are more capable of determining and interpreting the law than nonlawyers. We do citizens a great disservice to continue to allow a frontier justification for resolving legal disputes to persist well into the twenty-first century. We must set minimum standards for our judges, and that standard should be to have lawyers serving in these positions.

3. Set Sentencing Guidelines and Restrict Courts' Ability to Overuse Consecutive Sentences

Perhaps the most significant problem in justice court sentencing involves the lack of standardization among the courts. Some justice courts excessively sentence offenders to relatively long periods of incarceration and others have consistently overused incarceration for relatively minor offenses. Others have a more moderate approach. A committee, composed of justice court judges, district court judges, state supreme court justices and court administrators, needs to set justice court sentencing guidelines. These guidelines should also include a much higher use of community-based sanctions, rather than incarceration. When a justice court judge imposes a jail commitment, he needs to know what a standardized sentence would be.³¹⁰ Of course, justice court judges should have the flexibility to deviate from the guidelines in individual cases within their discretion. But sentencing guidelines would ensure that judges refrain from imposing unreasonably disproportionate or excessive punishments for crimes.

Additionally, the legislature should address the issue of the overuse of consecutive sentencing by justice court judges. Since the matters in front of them carry a maximum of 180 days incarceration, justice court judges should not be allowed to impose more than one consecutive sentence. If justice court judges have the ability to take minor offenses, like multiple traffic offenses, and run them consecutively for years at a time, they are clearly exceeding proper sentences for the offenses for which they have jurisdiction. A sentence over one year in custody enters felony territory, which the district courts should properly handle. Justice court judges should not have the option of wandering into this realm. Legislation should be proposed to limit a justice court judge's ability to exceed one year of incarceration.

4. Make Justice Courts Record Their Proceedings and Allow Supervision by Higher Courts

At a bare minimum, Utah should at least require proceedings of justice courts to be recorded. We no longer live on the frontier. Recording equipment is easily obtainable and relatively inexpensive. Because justice courts are not courts of record, much of what happens there is completely unreviewable. This results in additional costs to the state, which on appealed cases, must put on recurring trials and force witnesses to repeatedly come to court. Additionally, the actions of justice court judges cannot be reviewed by a higher court or by the public at large, since proceedings are not recorded. In a sense, a justice court's proceedings disappear as soon as they occur. Because of minimal cost and the benefits of an open court policy, the state should require its courts to record proceedings.

³¹⁰ For example, the guidelines could say one to two days for a first DUI, ten to fifteen for a second, etc. An unsure judge could then review the guidelines and approach sentencing accordingly.

Admittedly, this recommendation raises potential constitutional issues. Article VIII, section 11, of Utah's Constitution states that "no qualification may be imposed which requires judges of courts not of record to be admitted to practice law,"³¹¹ whereas article VIII, section 7 states that judges of courts of record must have been "admitted to practice law in Utah."³¹² What is not clear is whether recording the proceedings of justice courts, and allowing this record to be reviewed by a higher judge, makes justice courts into courts of record.

In the most recent Utah legislative session, the House and Senate passed a bill giving Utah justice courts one year, until July 1, 2012, to purchase and install recording equipment.³¹³ These records will not, however, be used for appellate review; rather, these recordings will be used for the limited purpose of judicial conduct complaints. If this law is challenged, any decision rendered will allow a glimpse into the potential ramifications of creating a record in justice courts. Utah must take the next step and require these recording devices to be allowed in subsequent hearings and appeals.

5. We Must Streamline and Improve the Appeal Process, Including Imposing Automatic Stays When Justice Court Sentences Are Appealed

Less than 1 percent of justice court cases in the state of Utah are appealed to the district court on a trial de novo appeal.³¹⁴ Yet the process engenders confusion and can result in several inequities. A defendant sentenced to jail on a DUI will not have his jail sentence stayed pending appeal, while a defendant sentenced to jail on a domestic violence could be instantly freed once he files a notice of appeal. The harm, especially over a fairly minor matter, will have already passed by the time a district court can step in to remedy the situation.

The trial de novo appeal process would be improved by requiring that if a defendant—on any misdemeanor—appeals his sentence from justice court, the sentence should be automatically stayed and he or she should revert to the position the defendant was in before the justice court imposed the sentence. Significantly, so long as the state advocates a de novo review, the defendant will revert automatically to innocence and the justice court conviction and sentence will be

³¹¹ UTAH CONST. art. VIII, § 11.

³¹² *Id.* § 7.

³¹³ Justice Court Modifications, S.B. 318, 2011 Gen. Assemb. (Utah, Mar. 16, 2011) (amending UTAH CODE ANN. § 78A-7-103). The bill passed both houses and was enrolled March 16, 2011. The added language is as follows: "(3) Notwithstanding Subsections (1) and (2), the Judicial Council may only create or certify a justice court that, on or before July 1, 2012, records its proceedings with a digital audio recording device and maintains the audio recordings for a minimum of one year." UTAH CODE ANN. § 78A-7-103 (West 2011).

³¹⁴ JUSTICE COURT FACT SHEET, *supra* note 309, at 9. Of 40,343 traffic cases, a total of thirteen were appealed. *Id.* In the Salt Lake City justice court in 2007, of 14,107 criminal cases, a total of 189 were appealed to the district court. *Id.*

completely wiped clean. The automatic stay, as articulated above, also prevents potential violations of due process.³¹⁵

Justice court judges might be concerned that certain defendants could be a danger to the community. If these defendants were to be released, then the judge—or the community—might feel that this person should remain in custody pending appeal. However, it is inconsistent to lock up justice court defendants pending appeal considering the de novo process mandates a wiping away of the justice court conviction and sentence. No matter this person's danger to the community, her conviction will be eliminated and her sentence will be vacated if she pursues a de novo appeal. As long as the de novo process remains in place, then it is extremely difficult to justify continued detention on the basis of the justice court conviction alone. Clearly, the easiest way to solve the problem is to allow the prosecution to go to the district court and request a warrant. However, if Utah is not committed to completely wiping the custody situation clean, the justice court judge could have the flexibility to order the defendant held on bail consistent with the bail schedule for the offense. The judge would then be required to enter a bail setting within twenty-four hours of receiving the appeal. That bail order may then be reviewed within seventy-two hours by the district court judge on his or her regular arraignment calendar.

Currently, the appellate statute makes arbitrary distinctions between DUIs and other misdemeanor offenses. It also allows the justice court judge too much leeway to continue to incarcerate an individual who will automatically receive a de novo trial and clean slate. The above recommendation best preserves competing interests. That is, it recognizes the inevitability of a fresh start and requires an automatic stay of the sentence, but it allows for community protection by permitting the justice court judge to impose bail.

6. Amend Justice Courts' Jurisdiction to Remove Enhanceable Cases from Their Jurisdiction

From crimes involving domestic violence to DUIs, justice courts preside over a myriad of criminal matters which are not only serious and potentially complicated, but enhanceable—meaning a conviction in justice court could be used to increase the severity of future, related, criminal offenses. For example, a DUI is ordinarily filed as a Class B misdemeanor. After a person's second conviction for DUI, any subsequent DUI within a ten-year period may be filed as a third-degree felony. Similarly, a person's first two theft convictions, assuming the value is under \$500, are Class B misdemeanors. A person's third theft charge is a third-degree felony, regardless of the value of the stolen item(s). Crimes involving domestic violence are increased by one degree after an initial conviction. For example, a person who is convicted of simple assault, domestic violence, a Class B

³¹⁵ See *North v. Russell*, 427 U.S. 328, 339 (1976); *Bernat v. Allphin*, 106 P.3d 707, 717 (Utah 2005) (acknowledging conceivable due process violations with burdensome stay requirements, though no violation was found in the facts at issue).

misdemeanor, would face enhancements of one degree (Class B to Class A misdemeanor, Third-degree to Second-degree felony, etc.) for each subsequent charge involving domestic violence.

In other words, justice courts do not simply hear minor matters of little consequence. The justice court often invokes the image of a traffic court. But these courts adjudicate serious offenses, which may result in major deprivations of liberty and major consequences to offenders. If Utah is committed to retaining its justice courts, then they should return their jurisdiction to the minor matters they were meant to have. Enhanceable offenses should return to the district court's jurisdiction.

CONCLUSION

Justice of the peace courts were created to bring justice to the people. For centuries, they have accomplished this goal, often with ridicule, but also with respect. However, in the twenty-first century, the benefits of having locally administered justice have long expired. Utah's justice of the peace courts look and feel exactly like district courts, yet they lack the benefits and protections afforded to citizens charged with more serious offenses. Some of Utah's justice courts lack experienced legally-trained judges. Most of Utah's justice courts lack judges who are independent of the financial concerns and priorities of their municipalities. They frequently impose harsh sentences on offenders based on the relatively minor nature of their offenses. They also frequently ignore basic constitutional protections, such as the right to counsel and the other legal issues. A crucial concern is the lack of meaningful appellate review.

Utah should strongly consider abolishing its justice courts in order to integrate them into a statewide system of justice that would "keep the peace" for all of the state's citizens. If Utah does not abolish its justice courts, then it should implement the procedures and reforms outlined in this Article. Utah continues to have an opportunity to provide meaningful, and constitutional, justice administered at its local level. Once these reforms were implemented, Utah could return once again to a system of local courts that could truly be called courts of justice.